

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 1022
200

HENRY E. STEVENS, JR., PETITIONER,

vs.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, AND REAL
ESTATE TITLE INSURANCE & TRUST COMPANY OF
PHILADELPHIA, EXECUTORS, &c.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR HABEAS CORPUS FILED OCTOBER 11, 1921.
CERTIORARI AND RETURN FILED JANUARY 11, 1922.

(28,553)

(28,553)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 598.

HENRY E. STEVENS, JR., PETITIONER,

vs.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, AND REAL
ESTATE TITLE INSURANCE & TRUST COMPANY OF
PHILADELPHIA, EXECUTORS, &c.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

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1

Petition for Appeal.

United States District Court for the District of New Jersey.

In Equity.

SAMUEL F. NIRDLINGER, Plaintiff,

VS.

HENRY E. STEVENS, JR., Defendant.

Petition for Appeal.

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

The above-named Henry E. Stevens, Jr., feeling aggrieved by the decree rendered and entered in the above-entitled cause on the twenty-fourth day of May, nineteen hundred and twenty, does hereby appeal from the said decree to the Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, under the rules of such court in such cases made and provided.

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And your petitioner further prays that the proper order relating to the required security to be required of him be made.

CARR & CARROLL,

Attorneys for Henry E. Stevens, Jr.

Appeal allowed upon giving bond as required by law for the sum of \$250.

J. L. BODINE,
Judge.

[Endorsed:] Filed Nov. 19, 1920, at 9 o'clock A. M. George T. Cranmer, Clerk.

Bond on Appeal.

United States District Court for the District of New Jersey.

In Equity.

SAMUEL F. NIRDLINGER, Plaintiff,

VS.

HENRY E. STEVENS, JR., Defendant.

Bond on Appeal.

Know all men by these presents, that we, Henry E. Stevens, Jr., of the City and County and State of New York, as principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, executors and trustees under the will of Samuel F. Nirdlinger, deceased, in the sum of two hundred and fifty dollars (\$250), lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and our respective heirs, executors, administrators and successors, by these presents.

Sealed with our seals and dated this twentieth day of November, 1920.

4 Whereas the above-named Henry E. Stevens, Jr., has prosecuted a writ of error to the United States Circuit Court of Appeals for the Third Circuit to reverse the judgment of the United States District Court for the District of New Jersey, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Henry E. Stevens, Jr., shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

HENRY E. STEVENS, JR. [L. S.]
UNITED STATES FIDELITY & GUARANTY
CO.,

By E. D. SNYDER, [SEAL.]
Attorney-in-Fact.

The within bond approved as to form and sufficiency.

J. L. BODINE,
Judge.

STATE OF NEW JERSEY,
County of Camden, ss:

On the twentieth day of November, 1920, personally appeared before me Henry E. Stevens, Jr., known to me to be one of the persons described in and who duly executed the foregoing instrument as a party thereto, and acknowledged for himself that he executed the same as his free act and deed for the purposes therein set forth.

HENRY E. STEVENS, JR.

5 Subscribed and sworn to before me this twentieth day of
November, A. D. 1920.
[SEAL.]

WILLIAM R. DORAN,
Notary Public of N. J.

STATE OF NEW JERSEY,
County of Camden, ss:

On the twentieth day of November, 1920, personally appeared before me E. D. Snyder, and known to me to be the person who executed the foregoing instrument as attorney-in-fact for the United States Fidelity and Guaranty Company, the surety therein named, and the said E. D. Snyder acknowledged that she executed the same as the free act and deed of the United States Fidelity and Guaranty Company, for the purposes therein set forth.

E. D. SNYDER.

Subscribed and sworn to before me this twentieth day of November,
A. D. 1920.
[SEAL.]

WILLIAM R. DORAN,
Notary Public of N. J.

The within bond is approved both as to sufficiency and form
this — day of November, 1920.

— — —
Judge.

[Endorsed:] Filed Nov. 27, 1920, at 9 o'clock, A. M. George
T. Cranmer, Clerk.

Citation on Appeal.

(Filed Dec. 7, 1920.)

United States District Court for the District of New Jersey.

In Equity.

SAMUEL F. NIRDLINGER, Plaintiff,

vs.

HENRY E. STEVENS, JR., Defendant.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To Arthur S. Arnold, Abram L. Erlanger, and Real Estate Title Insurance and Trust Company of Philadelphia, executors and trustees under the will of Samuel F. Nirdlinger, deceased, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Third Circuit, to be held at the City of Philadelphia, in the State of Pennsylvania, on the seventeenth day of December, 1920, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the District of New Jersey from a final decree signed, filed and entered on the twenty-fourth day of May, 1920, in that certain suit wherein you are the substituted plaintiffs in place of Samuel F. Nirdlinger, deceased, and Henry E. Stevens, Jr., is defendant and appellant, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Given under my hand, at the City of Trenton, in the District of New Jersey in the Third Circuit the 27 day of November 1920.

J. L. BODINE,
Judge.

Service of a copy of the within citation acknowledged this 4 day of Dec. 1920.

BOURGEOIS & COULOMB,
Solrs. of Plaintiff.

Bill of Complaint.

District Court of the United States for the District of New Jersey.

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

Samuel F. Nirdlinger, a resident and citizen of the City and County of Philadelphia, in the State of Pennsylvania, and a resident and citizen of said state, brings his bill of complaint against Henry E. Stevens, Jr., a resident and citizen of the City, County and State of New York, and thereupon your orator complains and says:

8 1. That he is the owner in fee simple of all that certain tract or parcel of land and premises situate, lying and being in the City of Atlantic City, in the County of Atlantic and State of New Jersey, bounded and described as follows:

Beginning at a point in the easterly line of New Hampshire Avenue, two hundred and forty feet southwesterly from Pacific Avenue, said point being the southeast corner of New Hampshire Avenue and Dewey Place; thence extending (1) eastwardly parallel with Pacific Avenue and along the south line of Dewey Place, one hundred and ninety feet; thence (2) southwardly parallel with New Hampshire Avenue to the present high water line of the Atlantic Ocean, about, to wit, four hundred and forty-two feet more or less; thence (3) southwesterly along the present high water line of the Atlantic Ocean to the easterly line of New Hampshire Avenue, extended; thence (4) Northerly along said line of New Hampshire Avenue to the place of beginning, to wit, about five hundred and seventy-seven feet, more or less.

Being part of the same premises, one-half whereof was conveyed to the said Samuel F. Nirdlinger by Louis E. Stern, by deed bearing date the seventeenth day of July, 1912, and recorded in the clerk's office of the County of Atlantic, on the 22nd day of July, 1914, in Book — of Deeds for said County, on pages —, etc.; and the remaining one-half whereof which was conveyed to the said Samuel F. Nirdlinger by deed of Dewey Land Company, dated the fourth day of February, 1914, and recorded in the said county clerk's office in Book 523, on pages 47, etc.

1½. And your orator further shows unto your Honor that the premises above described are the same premises conveyed by the States Avenue Land Company to the Dewey Land Company deed dated December 19th, 1904, and recorded in the office of the clerk of Atlantic County on January eleventh, 1905, in Book 313 of Deeds, page 363; that subsequently thereto, to wit, on the ninth day of December, A. D. 1907, the Dewey Land Company by deed of conveyance bearing that date, and recorded in the office of the clerk of Atlantic County in Book 382 of deeds, page 19, conveyed an equal undivided one-quarter part thereof to Samuel F. Nirdlinger, your orator; and that on the twentieth day of January,

1909, the Dewey Land Company by deed of conveyance, bearing that date, and recorded in the office of the clerk of Atlantic County in Book 395 of deeds, page 271, conveyed an equal undivided one-twelfth part in and to the said land and premises; that on the tenth day of February, 1909, the Dewey Land Company by deed dated that day, and recorded in the office of the clerk of the County of Atlantic in Book 398 of deeds, page 116, conveyed an equal undivided one-sixth part in and to the said premises, and that the deeds above set forth in paragraph one from Louis E. Stern to your orator, were the result of an amicable agreement by and between your orator and the Dewey Land Company whereby momentarily or temporarily the entire title was vested in the said Stern for the purpose of redistribution, in accordance with and respect to the interest of the Dewey Land Company, and your orator and the said Stern being seized of the said title divided the same, conveying to your orator an undivided one-half thereof, and to the Dewey Land Company the remaining one-half thereof; that your orator shortly subsequent to the time he received the first deed conveying one-fourth thereof in 1907 paid on behalf of himself and the

10 Dewey Land Company the taxes assessed upon the said premises, and assessment for street improvements abutting thereon, all of which were assessed and levied in the name of the Dewey Land Company and your orator, and the said premises were, from time to time, improved by grading, filling, curbing and paving, and the erection of jetties for the purpose of protecting same from the inroads of the sea, the cost and expense whereof was paid by your orator, whereby and in consequence thereof the said Dewey Land Company became indebted to your orator in a large sum, until finally on or about the fourth day of February, 1914, in consideration of the said indebtedness, and the further sum paid by your orator the said Dewey Land Company conveyed to your orator its remaining undivided one-half of said premises, as set forth in paragraph one, whereby your orator became seized and possessed of the whole thereof.

2. And your orator further shows unto your Honors, that he is and has, ever since he became the owner of said lands, been in peaceable possession thereof, and he believed and yet believes that he had and has a good title to said lands in fee simple, and has always claimed and does now claim to own the same accordingly.

3. And your orator further shows unto your Honors, that your orator's title to said lands, or part thereof, is denied and disputed by the said Henry E. Stevens, Jr., the defendant herein, and he the said Henry E. Stevens, Jr., claims, and is claimed and reputed to own said lands, or some part thereof, or some interest therein, or to have some encumbrance thereon, and no suit or action of
11 any kind whatever is pending to enforce or test the validity of said title, claim or encumbrance, and your orator charges that said claim so made by the said Henry E. Stevens, Jr., is utterly without foundation, unjust and vexatious.

4. And your orator further shows unto your Honors, that by reason of such claim your orator's property in said lands is greatly affected, and the same cannot be sold as they otherwise could.

5. And your orator further shows unto your Honors, that he has applied to the said Henry E. Stevens, Jr., the defendant herein, to release and relinquish his said claim so as aforesaid asserted by him, or to bring in some court of law or equity a suit or suits which would test the validity thereof, but the said defendant has refused and still does refuse to do either.

6. And for a further cause of action your orator complains and shows unto your Honors that a portion of said lands and premises above described is beach land, appurtenant to and parcel of upland owned by your orators; that the said Henry E. Stevens, Jr., claims to have some interest in, lien upon or title to said lands, or part thereof, by virtue of a certain alleged grant from the State of New Jersey to William H. Bartlett and others, dated the 28th day of June, in the year nineteen hundred, and recorded in Book 248 of Deeds for Atlantic County, on page 475, etc., and made by Foster M. Voorhees, governor, Willard C. Fiske, John I. Holt, William Cloak and John J. Farrell, riparian commissioners of the State of New Jersey,

12 wherein and whereby said riparian commissioners did purport to grant and convey unto the said William H. Bartlett and Elwood S. Bartlett, certain lands and premises in said grant described, to which for greater certainty your orator begs leave to refer; and the said William H. Bartlett, being unmarried, and Elwood S. Bartlett and Ellen L., his wife, by their certain deed of conveyance dated the twenty-fifth of April, nineteen hundred and five, and recorded in Book 316 of Deeds for Atlantic County, on page 487, purported to grant, sell and convey unto the said Henry E. Stevens, Jr., certain lands and premises in said deed of conveyance particularly described, including the lands and premises described in said riparian grant, just referred to.

7. That the said claim of the said Henry E. Stevens, Jr., of title to, lien upon, or interest in said lands and premises by reason aforesaid is invalid and void; that the said riparian commissioners had no authority or right to make said grant, and the same is void and of no effect as against your orator; that the said riparian grant if held valid as against your orator would violate the constitution of the State of New Jersey and of the United States, by appropriating and taking property without due process of law, or payment of any compensation to the true owner thereof. And that even if said riparian commissioners at the time of making said alleged conveyance had any authority whatever to make the same, which your orator denies, they nevertheless exceeded such authority in the alleged grant aforesaid, and included therein lands and premises (being part of the premises hereinabove particularly described) the title of which at the time of making said alleged grant was in the name of the predecessors in title of your orator to said lands and entirely beyond the power or scope of said riparian commissioners.

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8. And your orator further shows unto your Honors, that he has applied to the said Henry E. Stevens, Jr., the defendant herein, to release and relinquish his said claim so as aforesaid asserted by him, or to bring in some court of law or equity a suit or suits which would test the validity thereof, but the said defendant has refused and still does refuse to do either, and that while, as your orator insists and charges, the said claim is void and of no effect, nevertheless it purports to exist, and so long as it stands unchallenged remains a cloud upon the title of your orator, and injurious to your orator's rights therein, and should be removed.

9. The controversy herein is a controversy wholly between citizens of different states, and the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

Wherefore, inasmuch as your orator is relievable only in a court of equity, where matters of this sort by the inherent jurisdiction of this Court, as well as according to the statutes of the State of New Jersey, wherein said lands are located, are properly cognizable and relievable.

To the end, therefore, that the said defendant, Henry E. Stevens, Jr., may, but without oath or affirmation, to the best of his knowledge, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, and more particularly that he may in manner aforesaid, answer and set forth specifically what title or claim to said lands, or any part thereof, or

14 any interest therein, or encumbrances thereon, he makes or claims, and to what part and what interest; and further, how and by what instrument such title is claimed or derived, or was created; and, by the determination and final decree of this Court, that the rights of all the parties to this suit in and to the lands hereinabove set forth, and every part thereof, may be fixed and settled, and that your orator may be decreed to have a perfect title thereto, and the said defendant to have no estate, interest in or encumbrance upon said lands, or any part thereof, and that his claims to the same are unjust, vexatious and void, and that the cloud upon the title of your orator to said lands and premises created and occasioned by the alleged riparian grant hereinabove referred to, and the deed of conveyance from William H. Bartlett and Elwood S. Bartlett and wife to the defendant hereinabove referred to may be, so far as said lands and premises are concerned, declared and decreed to be null and void, and of no effect as against your orator, and that your orator's right in and title to said lands and premises may be decreed to be relieved from the lien or cloud occasioned by said alleged riparian grant and deed of conveyance, and that the said defendant, Henry E. Stevens, Jr., may be likewise decreed to have no title or interest in or to said lands and premises by reason of said alleged riparian grant and deed, and that your orator may have such other and further relief as to your honors shall seem meet and shall be agreeable to equity.

And may it please your Honors, the premises considered, to grant unto your orator a writ of subpoena, issuing out of and under the seal

of this Honorable Court, to be directed to the said Henry E. Stevens, Jr., commanding him on a certain day and under a certain
15 penalty therein to be specified, personally to be and appear before Your Honors in this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand to, abide by and perform such order, direction and decree as to your Honors shall seem meet, and as shall be agreeable to equity and good conscience.

And your orator will ever pray, etc.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Complainant.

Answer.

United States District Court for the District of New Jersey.

In Equity.

Between

SAMUEL F. NIRDLINGER, Complainant,
and

HENRY E. STEVENS, JR., Defendant.

The Answer of the Above-named Defendant to the Bill of Complaint of the Above-named Complainant.

In answer to the said bill I, Henry E. Stevens, Jr., say as follows:

16 1. I admit that Samuel F. Nirdlinger, the complainant, is the owner of a portion of the lands described in paragraph 1 of the bill of complaint. I deny that the said complainant has title to any portion of the lands hereinafter particularly described in paragraph 4c of this answer. I am without knowledge or information sufficient upon which to found a belief as to the conveyance made by Nirdlinger to Stern, and by Nirdlinger to Dewey Land Company.

1½. I admit that a conveyance of lands was made by the States Avenue Land Company to the Dewey Land Company, by deed dated December nineteenth, nineteen hundred and four, purporting to convey to Nirdlinger an equal undivided one-fourth part of the lands and premises in said deed particularly described, but I deny that the said deed contained the description set forth in paragraph 1 of said bill, and I further deny that the said Nirdlinger by said deed acquired title to any of that portion of the lands particularly described in paragraph 4c of this answer. I admit that on or about the twentieth day of June, nineteen hundred and nine, the Dewey Land Company made, executed and delivered unto Samuel F. Nirdlinger a deed purporting to convey to the said Nirdlinger in fee simple an equal undivided one-twelfth part in the lands and prem-

ises described in said deed, but I deny that the description in the said deed is the same as that set forth in paragraph 1 of said bill, and I deny that by virtue of the said deed title became vested in the said Nirdlinger to any portion of the lands and premises particularly described in paragraph 4c of this answer. I admit that on or about the tenth day of February, nineteen hundred and nine, the

17 Dewey Land Company made, executed and delivered to Samuel F. Nirdlinger a deed of conveyance purporting to convey to said Nirdlinger an equal undivided one-sixth part of the lands and premises in said deed described, but I deny that thereby title thereto became vested in the said Nirdlinger in and to any portion of the lands and premises particularly described in paragraph 4c of this answer. I have no knowledge, information or belief "of the deeds above set forth in paragraph 1 from Louis E. Stern to the complainant. In fact, I find no allegation in paragraph 1 of such a conveyance. I have no knowledge, information or belief as to any conveyances between Stern, Dewey Land Company and the complainant, except as hereinabove admitted, nor have I any knowledge, information or belief of the purposes of such conveyances, if such conveyances were made, I have no knowledge, information or belief as to what taxes, if any, were paid by the Dewey Land Company or the complainant, nor of the erection of jetties for the purpose of protecting the premises described in the bill of complaint from the inroads of the sea or the cost or expense thereof, nor have I any knowledge, information or belief as to whether said expenses were paid or incurred.

2. I admit that the complainant is the owner of a part of the lands described in paragraph 1 of said bill, I deny that the complainant is the owner of that portion of said lands particularly described in paragraph 4c hereof. I deny that the complainant has any title whatever to that portion of the lands described in said bill that are embraced in paragraph 4c of this answer.

3. I admit that that portion of the lands described in the bill of complaint, particularly described in paragraph 4c of this
18 answer, is owned by me in fee simple.

4. I deny that the complainant has any interest whatever in the lands particularly described in paragraph 4c of this answer, and aver the facts to be as follows:

4a. That William H. Bartlett, a single man, and Elwood S. Bartlett and wife, being then and there lawfully seized of the lands herein after particularly described, sold for a valuable consideration the said lands and made, executed and delivered to me a deed containing full covenants of warranty and seizen, conveying to me title in fee simple thereto, said deed being dated the twenty-fifth day of April, nineteen hundred and five, and recorded in the office of the clerk of Atlantic County in Book No. 316 of Deeds, at page 487 &c., and I further aver that a fee simple title to such portion of the said lands as lie below the high water line of the Atlantic Ocean was vested in the said William H. Bartlett and Elwood S. Bartlett

by a grant from the State of New Jersey by its deed of conveyance dated the twenty-eighth day of June, nineteen hundred, and recorded in the office of the clerk of the County of Atlantic in Book 248 of Deeds, at page 475. That the lands and premises conveyed by the said deed from William H. Bartlett and Elwood S. Bartlett and wife, dated April twenty-fifth, nineteen hundred and five, are particularly described as follows:

4b. Tract 1.—All that certain tract or parcel of land and premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

19 Beginning in the westerly line of New Hampshire Avenue two hundred and fifty feet southwardly from the southerly line of Pacific Avenue; thence westerly parallel with Pacific Avenue one hundred and sixty feet; thence northwardly parallel with New Hampshire Avenue one hundred feet; thence westwardly parallel with Pacific Avenue fifteen feet; thence southwardly parallel with New Hampshire and Vermont Avenues two hundred and fifty feet to the northerly line of Oriental Avenue; thence continuing the same course parallel with said New Hampshire and Vermont Avenues and crossing Oriental Avenue to the high water mark of the Atlantic Ocean; thence northeastwardly along the high water mark to the westerly line of New Hampshire Avenue; thence northwardly along the westerly line of New Hampshire Avenue recrossing Oriental Avenue to the northerly line thereof; thence still along the westerly line of New Hampshire Avenue one hundred and fifty feet to the place of beginning.

4c. Tract No. 2.—Beginning at a point in the high water line of the Atlantic Ocean as the same existed in May, nineteen hundred, said point being distant three hundred and twenty-five feet southwardly at right angles from the southerly line of Pacific Avenue and one hundred and seventy-five feet eastwardly at right angles from the easterly line of Vermont Avenue, and extends thence (1) southwardly parallel with Vermont Avenue and distant one hundred and seventy-five feet eastwardly at right angles from the easterly line of the same one hundred and eighty-five feet to a point in the easterly line of lands under water granted by the State of New Jersey to

20 Walter B. Dick, December twenty-eighth, eighteen hundred and ninety-nine; thence (2) southeastwardly in a straight line and along the easterly line of lands as above granted to Walter B. Dick seven hundred and twenty-nine and thirty-eight one hundredths feet to a point in the exterior line established by the riparian commissioners of the State of New Jersey, said point being distant three hundred and seventy-eight feet northeastwardly along said exterior line from where it is intersected by the easterly line of Vermont Avenue extended southerly; thence (3) northeastwardly along said exterior line curving to the left on a radius of four thousand feet; four hundred and ninety-four feet to a point; thence (4) northwestwardly in a straight line seven hundred and forty-four and thirty-nine hundredths feet to a point in the high water line of the

Atlantic Ocean where the same is intersected by the westerly line of New Hampshire Avenue, said point being distant two hundred and fifty feet southwardly from the south line of Pacific Avenue; thence (5) southwesterly along the said high water line to the place of beginning.

4d. I charge and aver that I am lawfully seized in fee simple of all that part of the lands and premises contained in the bill of complaint which are embraced in the second tract described in paragraph 4 lying eastwardly of the easterly line of New Hampshire Avenue and more particularly described as follows:

4e. Beginning at the intersection of the easterly line of New Hampshire Avenue with the fourth course in the above description of tract No. 2; thence extending southwardly along the easterly line of New Hampshire Avenue extended to a point in the exterior line established by the riparian commissioners where it is intersected by the easterly line of New Hampshire Avenue extended southwardly; thence eastwardly along said exterior line curving to the left on a radius of four thousand feet to where the said exterior line intersects the fourth course of the said description, thence northwestwardly in a straight line to a point intersecting the easterly line of New Hampshire Avenue, being the place of beginning.

5. I deny that the complainant has applied to me to release or relinquish my claim to any of the above described lands. I deny that I have been requested to bring a suit or action in some court of law or equity to test the validity of my claim, but aver the facts to be that on the second day of October, nineteen hundred and nine, the Dewey Land Company, a then predecessor in the title as to an undivided one-half interest in said lands and the present complainant as the owner of the other one-half interest, filed its bill of complaint in the Court of Chancery of New Jersey against me and James W. Northup, a mortgagee, setting up its claim of title against me and the said Northup, and praying therein, inter alia, as follows:

"That the said defendants * * * answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they or either of them, make or claim, and to what part or what interest; and further how, and by what instrument said title is claim- or derived or was created; and that by the determination and final decree of this court, the rights of all the parties to the suit in and to the lands hereinbefore set forth, and every part thereof may be fixed and settled; and that your orators may be decreed to have a perfect title thereto, and the defendants to have no estate, interest in, or encumbrance on, said lands or any part thereof; and that their claims to the same are unjust, vexatious and void."

5a. An answer was filed in said suit by both of the defendants therein, and such further proceedings were had therein that the issues raised thereby were, on the second day of February, nineteen

hundred and twelve, tried before the Honorable Edwin Robert Walker, one of the Vice-Chancellors of said Court, and a final decree was entered therein after a trial upon the merits, which said final decree was filed on the seventh day of September, nineteen hundred and twelve, and reads as follows:

"This matter coming on to be heard on the second day of February, nineteen hundred and twelve, in the presence of Robert H. Ingersoll and George A. Bourgeois, of counsel with the complainants, and of Wilson & Carr, of counsel with the defendants; and the Court having heard and considered the proofs, and the arguments of respective counsel; and it appearing to the satisfaction of the Court that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill of complaint contained and set forth, and that said bill ought to be dismissed with costs;

It is thereupon on this seventh day of September, nineteen hundred and twelve, on motion of Wilson & Carr, solicitors for and of counsel with the defendants, ordered that the complainants' bill of complaint be and the same is hereby dismissed with costs.

23 And it is further ordered that a fee of one hundred and fifty dollars be and the same is hereby allowed to the solicitors of the defendants, and the same to be taxed as part of the costs of this suit and to be collectible therewith.

E. R. WALKER, C."

5b. Thereafter said final decree was appealed to the New Jersey Court of Errors and Appeals, and the said decree was affirmed by the final decree of that court entered on the fifteenth day of June, nineteen hundred and fourteen.

5c. I annex hereto, and hereby make a part hereof, the following papers in the said suit lately pending in the New Jersey Court of Chancery:

- (a) Bill of complaint.
- (b) Amended bill of complaint.
- (c) Answer.
- (d) Replication.
- (e) Final decree of Court of Chancery.
- (f) Final decree and remittitur of Court of Errors and Appeals.

5d. I do further show that the complainant herein is barred from any relief as to the matters and things set forth in said bill, because said complainant was both a party to and privy in the estate with the complainant in the said suit in the New Jersey Court of Chancery, and that the decree of the said New Jersey Court of Chancery, affirmed by the New Jersey Court of Errors and Appeals, is res judicata of all matters in controversy herein, and established a title in the defendant herein as to the lands particularly described in para-

graph 4e, superior to and in exclusion of that of the complainant, and I pray that the Court may call up and dispose of the questions raised by the defense of res judicata prior to final hearing.

6. I admit that a grant was made from the State of New Jersey to William H. Bartlett and others, dated the twenty-eighth day of June, nineteen hundred. I admit that William H. Bartlett, Elwood Bartlett and Ellen I. Bartlett, his wife, by their certain deed of conveyance, dated the twenty-fifth day of April, nineteen hundred and five, granted and conveyed to me the lands and premises therein particularly described, including the lands and premises described in the riparian grant from the State of New Jersey to Bartlett above mentioned, and I aver that by virtue of said conveyances a good and sufficient fee simple title in law and in equity was vested in me, and I do further aver that such title is exclusive of and superior to any title of the complainant in and to the lands described in said deed of conveyance in this paragraph mentioned.

7. I deny that my claim of title to, lien upon, and interest in the lands and premises described in paragraph 4e of this answer is invalid and void. I deny that the riparian commissioners had no right to make the said grant. I deny that the same is of no effect against the complainant. I deny that the said riparian grant violates the constitution of the State of New Jersey and that of the United States in any manner whatsoever. I deny that the said riparian commissioners exceeded their authority in making the said riparian grant and I deny that title was at the time of the said grant in the State

25 Avenue Land Company by virtue of a deed made by the Atlantic City Beach Front Improvement Company to said State Avenue Land Company, as set forth in paragraph 7, and I deny that the title to the easterly one hundred feet bounding along the westerly ninety feet of said lands was at the time of the making of the said riparian grant in Charles G. Henderson, Jr., J. Franklin Moss, and John C. Hancock under and by virtue of a deed made by Atlantic City Beach Front Improvement Company to the said Henderson, Moss and Hancock, as set forth in the bill of complaint. I deny all other allegations in paragraph 7 of said bill not here otherwise specifically denied.

8. I have fully answered the allegation of this paragraph in the foregoing paragraphs of this answer.

9. I admit the diversity of citizenship, and that the amount in controversy exceeds in value the sum of three thousand dollars.

By Way of Counter-Claim in the nature of a cross bill I show that the present suit is vexatious and without just cause, and is intended to unduly annoy and embarrass my title after the same has been established by the court of last resort of this State, and that the constant and unfounded claim by the complainant of title to that portion of the lands embraced in the riparian grant made by the State of New Jersey to the Bartletts, and conveyed by the Bartletts to

myself, injuriously affects my title thereto and renders the same unmarketable.

I therefore pray that it may be adjudicated in this suit that my title to the said lands is paramount to and exclusive of any title of the complainant therein or thereto, and that upon such adjudication the complainant be directed to execute a proper instrument in writing, duly acknowledged, retracting any claim to the lands owned by myself, and particularly described in paragraph 4e of this answer, and that said complainant, his servants and agents, be perpetually enjoined from thereafter making any claim thereto arising out of any matter or thing set forth in said bill of complaint, and from making or attempting to make any conveyance, lease, assignment or transfer of any interest in my said lands, and particularly described in paragraph 4e of this answer, where said conveyances, lease, assignment or transfer is based upon any alleged right or claim of the said complainant existing at the time of the filing of the said bill.

I further pray that that portion of the answer which includes a set-off or counter-claim may be answered by the complainant within the time prescribed by the rules of this court, without oath or affirmation.

I further pray that said bill of complaint be dismissed with costs.

WILSON & CARR,
HARVEY F. CARR,

Counsel, Attorneys for and of Counsel with Defendant.

EXHIBIT A.

Between

DEWEY LAND COMPANY et al., Complainants and Appellants,
and

HENRY E. STEVENS, JR., et al., Defendants and Respondents.

On Bill to Quiet Title.

Bill.

In Chancery of New Jersey.

To His Honor Mahlon Pitney, Chancellor of the State of New Jersey:

Complaining, shows unto your Honor your orators, The Dewey Land Company, a corporation of the State of New Jersey, and Samuel F. Nirdlinger, that on or about the nineteenth day of December, A. D. nineteen hundred and four, your orator, the said Dewey Land Company, purchased of the States Avenue Land Company, a corporation of the State of New Jersey, for a full valuable consideration, and the said Dewey Land Company conveyed by a deed containing

full covenants of warranty and seisin to your orator, The Dewey Land Company, all that certain tract or parcel of land and premises in the city of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

Beginning at a point in the easterly line of New Hampshire Avenue, two hundred and forty feet southwardly from Pacific Avenue, said point being the southeast corner of New Hampshire Avenue and Dewey Place, thence extending (1) eastwardly parallel with Pacific Avenue and along the south line of Dewey Place one hundred and ninety feet; thence (2) southwardly parallel with New Hampshire Avenue two hundred and ninety feet, more or less, to the high water-line of the Atlantic Ocean; thence (3) southwestwardly along the high water-line of the Atlantic Ocean, the several courses and distances thereof to the easterly line of New Hampshire Avenue; thence (4) northwardly along said line of New Hampshire Avenue four hundred and thirty-eight feet, more or less, to the place of beginning, which said deed was recorded in the clerk's office of Atlantic County at May's Landing, New Jersey, in book number 313 of deeds, pages 363, etc.

And that by reasons of the accretions of land in front of the said tract of land by alluvial deposits and the high water-line of the Atlantic Ocean being carried out, the said tract of land and premises is now described as follows:

Beginning at a point in the easterly line of New Hampshire Avenue, two hundred and forty feet southwardly from Pacific Avenue, said point being the southeast corner of New Hampshire Avenue and Dewey Place, thence extending (1) eastwardly parallel with Pacific Avenue and along the south line of Dewey Place one hundred and ninety feet; thence (2) southwardly parallel with New Hampshire Avenue five hundred and forty-five feet, more or less, to the high water-line of the Atlantic Ocean; thence (3) southwestwardly along the high water-line of the Atlantic Ocean, the several courses and distances thereof, to the easterly line of New Hampshire Avenue; thence (4) northwardly along said line of New Hampshire Avenue five hundred and fifty-eight feet, more or less, to the place of beginning.

29 And your orators further show that on or about the ninth day of December, A. D. nineteen hundred and seven, your orator, the said Samuel F. Nirdlinger, purchased of your orator, The Dewey Land Company, for a full valuable consideration, and the said The Dewey Land Company, conveyed by a deed containing full covenants of warranty and seisin to your orator, the said Samuel F. Nirdlinger, in fee simple, an equal undivided one-fourth part of said described lands and premises hereinbefore described, which said deed was recorded in the clerk's office of Atlantic County, in book number 382 of deeds, page 19, etc.

And your orators further show that on or about the twentieth day of January, A. D. nineteen hundred and nine, your orator, the said Samuel F. Nirdlinger, purchased of your orator, The Dewey Land Company, for a full valuable consideration, and said, The Dewey Land Company, conveyed by a deed containing full covenants

warranty and seisin to your orator, the said Samuel F. Nirdlinger, in fee simple, an equal undivided one-twelfth part of said described lands and premises hereinbefore described, which said deed was recorded in the clerk's office of said county in book number 395 of deeds, page 271, etc.

And your orators further show that on or about the tenth day of February, A. D. nineteen hundred and nine, your orator, the said Samuel F. Nirdlinger, purchased of your orator, The Dewey Land Company, for a full valuable consideration, and said, The Dewey Land Company conveyed by a deed containing full covenants of warranty, and seisin to your orator, the said Samuel F. Nirdlinger, in fee simple, an equal undivided one-sixth part of said described lands and premises hereinbefore described, which said deed was recorded in the clerk's office of said county of Atlantic in book number — of deed, page —.

That the said deeds are in your orators' possession and ready to be produced and proved as may be directed; and that your orators have, ever since the recording of the said deeds respectively, been in the peaceable possession of the lands therein and above described; and that at the time of purchasing said lands and taking said deeds your orators believed and yet believe that they and each of them bought and acquired a good title to said lands and of the said equal undivided one-half part thereof, and they have always claimed and do now claim to own the same accordingly.

That your orators' title to said lands, or some part thereof, is denied and disputed by Henry E. Stevens, Jr., who is one of the defendants in this suit; and he, one of the said defendants, claimed and is claimed and reputed to own said lands, or some part thereof, or some interest therein; and no suit or action of any kind whatever is pending to enforce or test the validity of such title or claim, and your orators charge that such claims so made by the said Stevens are utterly without foundation, unjust and vexatious.

That your orators' title to said lands, or some part thereof, is denied and disputed by one James W. Northup, said James W. Northup, claims to hold a mortgage against said lands, or some part thereof, by reason of an assignment from the Girard Trust Company, et al., and by reason of which assignment the said James W. Northup claims to have some interest therein; that no suit or action of any kind whatever is pending to enforce or test the validity of said title or claim by reason of said assignment, and your orators charge that such claims so made by the said Northup are utterly without foundation, unjust and vexatious.

That by reason of such claims your orators' property in said lands is greatly affected, and the same cannot be sold as they otherwise could.

That your orators have applied to both of said defendants to release and relinquish their said claims, or to bring in some court of law a suit or suits which would test the validity thereof, and the said defendants refuse to do either. And your orators hoped that

said defendants would have complied with such reasonable request as in justice and equity they ought to have done.

In consideration whereof, and forasmuch as your orators are relievable only in a court of equity, where matters of this sort are properly and according to the statutes of this State in such cases made and provided, cognizable and relievable.

To the end, therefore, that the said defendants, and every of them may without oaths or affirmations, to the best of their respective knowledge, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid; and more particularly that they, and every of them, may, in manner aforesaid answer and set forth specifically what title or claim to said lands or any part thereof, or any interest therein, they or either of them make or claim, and to what part or what interest; and further how and by what instrument such title is claimed or derived or was created; and that by the determination and final decree of this court the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and

32 that your orators may be decreed to have a perfect title thereto, and the defendants to have no estate, interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void; and that your orators may have such other or further relief in the premises as the nature of the case may require, and as they shall be entitled to, pursuant to the statute in such case made and provided.

May it please your Honor, the premises considered, to grant to your orators a writ of writs of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, commanding them and each of them at a certain day and under a certain penalty therein to be specified, personally to be and appear before your Honor in this Honorable Court, then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, abide and perform such order, direction and decree as to Your Honor shall seem meet and as shall be agreeable to equity and good conscience.

And your orators will ever pray, etc.

C. L. GOLDENBERG,

ROBERT H. INGERSOLL,

Solicitors for and of Counsel for Complainant.

33

EXHIBIT B.

Amended Bill.

In Chancery of New Jersey.

To His Honor Mahlon Pitney, Chancellor of the State of New Jersey:

Complainant shows unto your honor your orators, The Dewey Land Company, a corporation of the State of New Jersey, and

Samuel F. Nirdlinger, that on or about the nineteenth day of December, A. D. nineteen hundred and four, your orator, the said Dewey Land Company, purchased of the States Avenue Land Company, a corporation of the State of New Jersey, for a full valuable consideration, and said The Dewey Land Company conveyed by a deed containing full covenants of warranty and seisin to your orator, The Dewey Land Company, all that certain tract or parcel of land and premises in the city of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

Beginning at a point in the easterly line of New Hampshire Avenue two hundred and forty feet southwesterly from Pacific Avenue, said point being the southeast corner of New Hampshire Avenue and Dewey Place, thence extending (1) eastwardly, parallel with Pacific Avenue and along the south line of Dewey Place, one hundred and ninety feet; thence southwardly, parallel with New Hampshire Avenue, to the high water-line of the Atlantic Ocean as it existed in eighteen hundred and fifty-two; thence (3) southerly, along the high water-line of the Atlantic Ocean as it existed in eighteen hundred and fifty-two, to the easterly line of New Hampshire Avenue, extended; thence (4) northwardly, along said line of New Hampshire Avenue, to the place of beginning.

Conveyed to complainants by various deeds of conveyance.

34 And your orators further show that on or about the ninth day of December, A. D. nineteen hundred and seven, your orator, the said Samuel F. Nirdlinger, purchased of your orator, The Dewey Land Company, for a full valuable consideration, and said The Dewey Land Company conveyed, by a deed containing full covenants of warranty and seisin, to your orator, the said Samuel F. Nirdlinger, in fee simple, and equal undivided one-fourth part of said described lands and premises hereinbefore described, which said deed was recorded in the Clerk's office of Atlantic County, in Book No. 382 of Deeds, page 19, etc.

And your orators further show that on or about the twentieth day of January, A. D. nineteen hundred and nine, your orator, the said Samuel F. Nirdlinger, purchased of your orator, The Dewey Land Company, for a full valuable consideration, and said The Dewey Land Company conveyed, by a deed containing full covenants of warranty and seisin, to your orator, the said Samuel F. Nirdlinger, in fee simple, an equal undivided one-twelfth part of said described lands and premises hereinbefore described, which said deed was recorded in the Clerk's office of said county, in Book No. 395 of Deeds, page 271, etc.

And your orators further show that on or about the tenth day of February, A. D. nineteen hundred and nine, your orator, the said Samuel F. Nirdlinger, purchased of your orator, The Dewey Land Company, for a full valuable consideration, and said The Dewey Land Company conveyed, by a deed containing full covenants of warranty and seisin, to your orator, the Samuel F. Nirdlinger, in fee simple, an equal undivided one-sixth part of said de-

scribed lands and premises hereinbefore described, which said
35 deed was recorded in the Clerk's office of said county of
Atlantic, in Book No. — of Deeds, page —.

And your orators further show that on the first day of November,
nineteen hundred and eleven John McClees conveyed to Dewey Land
Company a certain tract of land, particularly described as follows:

All that certain tract or parcel of land and premises situate, lying
and being in the City of Atlantic City, in the County of Atlantic and
State of New Jersey, beginning in the middle line of New Hamp-
shire Avenue, distant two hundred and fifteen feet southwardly from
the southerly side of Pacific Avenue, thence extending eastwardly,
parallel with Pacific Avenue, two hundred and fifteen feet, and of
that width throughout, southeasterly between parallel lines parallel
with the center line of New Hampshire Avenue, to the high water-
mark of the Atlantic Ocean as the same existed on the fifteenth day
of April, eighteen hundred and fifty-three.

And your orators further show that on the first day of February,
nineteen hundred and twelve, Horace M. Leeds and Minnie A., his
wife; Alberta L. Currie, widow; Harry B. Leeds and Harriet Scull
Leeds, his wife; Leurilda Nice and Oliver T. Nice, her husband,
and Oneida Richards, widow, heirs at law of Robert B. Leeds, de-
ceased, conveyed to Dewey Land Company a tract of land, particu-
larly described as follows:

All that certain tract or parcel of land and premises situate, lying
and being in the City of Atlantic City, in the County of Atlantic
and State of New Jersey, beginning at a point in the southerly line
of Dewey Place two hundred and ten feet (210) west of the west
line of Maine Avenue, and runs thence (1) southerly and
36 parallel with Maine Avenue to high-water mark of the At-
lantic Ocean or Absecon Inlet as it existed in the year 1852;
thence (2) westerly, in and along said high-water mark, one hun-
dred and ninety feet, more or less, to the east line of New Hampshire
Avenue, if extended; thence (3) northerly, in the east line of the
said New Hampshire Avenue, to the south line of Dewey Place;
thence (4) eastwardly, in the south line of Dewey Place, one hun-
dred and ninety feet, to the place of beginning.

And your orators further show that on the second day of Feb-
ruary, nineteen hundred and twelve, Dewey Land Company, con-
veyed unto your orator, Samuel F. Nirdlinger, the equal undivided
one-half part of the lands so conveyed to it by the said McClees,
Leeds and others, above described.

That the said deeds are in your orators' possession and ready to
be produced and proved as may be directed; and that your orators
have, ever since the recording of said deeds respectively, been in the
peaceable possession of the lands therein and above described, and
that at the time of purchasing said lands and taking said deeds your
orators believed and yet believe that they and each of them bought
and acquired a good title to said lands and of the said equal undi-
vided one-half part thereof, and they have always claimed and do
now claim to own the same accordingly.

That your orators' title to said lands, or some part thereof, is denied and disputed by Henry E. Stevens, Jr., who is one of the defendants in this suit; and he, one of the said defendants, claimed and is claimed and reputed to own said lands, or some part thereof, or some interest therein; and no suit or action of any kind
37 whatever is pending to enforce or test the validity of such title or claim, and your orators charge that such claims so made by the said Stevens are utterly without foundation, unjust and vexatious.

That your orators' title to said lands, or some part thereof, is denied and disputed by one James W. Northup, who is one of the defendants in this suit; and he, the said James W. Northup, claims to hold a mortgage against said lands, or some part thereof, by reason of an assignment from the Girard Trust Company, et al., and by reason of which assignment the said James W. Northup claims to have some interest therein; that no suit or action of any kind whatever is pending to enforce or test the validity of said title or claim by reason of said assignment, and your orators charge that such claims so made by the said Northup are utterly without foundation, unjust and vexatious.

That by reason of such claims your orators' property in said lands is greatly affected, and the same cannot be sold as they otherwise could.

That your orators have applied to both of said defendants to release and relinquish their said claims or to bring in some court of law a suit or suits which would test the validity thereof, and the said defendants refuse to do either.

And your orators hoped that said defendants would have complied with such reasonable request, as in justice and equity they ought to have done.

In consideration whereof, and forasmuch as your orators are relievable only in a court of equity, where matters of this sort are properly, and, according to the statutes of this State in such case made and provided, cognizable and relievable.

To the end, therefore, that the said defendants, and every of them, may, but without oaths or affirmations, to the best of
38 their respective knowledge, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid; and more particularly that they, and every of them, may in manner aforesaid, answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they or either of them, make or claim and to what part and what interest; and, further, how and by what instrument such title is claimed or derived or was created; and, by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and that your orators may be decreed to have a perfect title thereto, and the defendants to have no estate, interest in or encumbrance on said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void; and that your orators may have such other or further relief in the premises as

the nature of the case may require, and as they shall be entitled to pursuant to the statute in such case made and provided.

May it please your honor, the premises considered, to grant to your orators a writ or writs of subpoena, issuing out of and under the seal of this honorable court, to be directed to the said defendants, commanding them and each of them, at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honor in this honorable court, then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand to, abide and perform such order, direction and decree as to your honor shall seem meet, and as shall be agreeable to equity and good conscience.

39 And your orators will ever pray, etc.

BOURGEOIS & COULOMB,

Solicitors for and of Counsel with Complainants.

EXHIBIT C.

In Chancery of New Jersey.

Between

DEWEY LAND COMPANY et al., Complainants,

and

HENRY E. STEVENS, JR., et al., Defendants.

On Bill, etc.

Answer.

The Answer of Henry E. Stevens, Jr., to the Bill of Complaint of Dewey Land Company and Samuel F. Nirdlinger, Complainants.

This defendant, answering says:

1. That he admits that on or about the nineteenth day of December, nineteen hundred and four, the States Avenue Land Company made, executed and delivered to the Dewey Land Company and Samuel F. Nirdlinger a deed purporting to convey the lands and premises particularly described in the second paragraph of the bill of complaint, but this defendant denies that title to any portion of the said lands hereinafter particularly described in paragraph 7 of this answer thereby became vested in the complainants.

40 2. This defendant admits that the shore line of the said tract of land has been extended by alluvial deposits and that the high water line of the Atlantic Ocean has been carried out, but as to the exact extent thereof this defendant is ignorant and leaves the complainants to make proof thereof.

3. This defendant admits that on or about the ninth day of December, nineteen hundred and seven, the Dewey Land Company

made, executed and delivered its deed of conveyance to Samuel F. Nirdlinger, purporting to convey to the said Nirdlinger an equal undivided one-fourth part of the lands and premises particularly described in the said bill of complaint, but this defendant denies that thereby the said Nirdlinger acquired title to that portion of any of said lands particularly described in paragraph 7a of this answer.

4. This defendant admits that on or about the twentieth day of January, nineteen hundred and nine, the Dewey Land Company made, executed and delivered unto Samuel F. Nirdlinger a deed purporting to convey to the said Nirdlinger in fee simple, an equal undivided one-twelfth part in the said described lands and premises, but this defendant denies that thereby title thereto became vested in the said Nirdlinger as to any portion of the said lands and premises particularly described in paragraph 7a of this answer.

5. This defendant admits that on or about the tenth day of February, nineteen hundred and nine, the Dewey Land Company made, executed and delivered to Samuel F. Nirdlinger a deed of conveyance purporting to convey to the said Nirdlinger an equal undivided one-sixth part of the said described lands and premises, but this defendant denies that thereby title thereto became vested in the said Nirdlinger in and to any portion of the lands and premises particularly described in paragraph 7a of this answer.

6. This defendant admits that complainants' claim to title to that part of the lands described in the bill of complaint, which are embraced in the second tract described in this paragraph, is disputed by this defendant, and this defendant denies that the said complainants have title thereto. This defendant admits that no suit or action other than this cause is pending to enforce or test the validity of the title of this defendant. This defendant denies that the title claimed by him is without foundation, but avers the facts to be as follows:

6a. That William H. Bartlett, a single man, and Elwood S. Bartlett and wife, being then and there lawfully seized of the lands hereinafter particularly described, sold for a valuable consideration to this defendant the said lands and made, executed and delivered to this defendant a deed containing full covenants of warranty and seized to this defendant, conveying to this defendant title in fee simple thereto, said deed being dated the twenty-fifth day of April, nineteen hundred and five, and recorded in the Clerk's office of Atlantic County, in Book No. 316 of Deeds, at page 487, etc. And this defendant further avers that a fee simple title to such portion of the said lands as lie below the high-water line of the Atlantic Ocean was vested in the said William H. Bartlett and Elwood S. Bartlett by a grant from the State of New Jersey, by its deed of conveyance or grant dated the twenty-eighth day of June, nineteen hundred, and recorded in the office of the Clerk of the County of Atlantic in Book 248 of Deeds, at page 475. That the lands and premises conveyed

by the said deed from William H. Bartlett and Elwood
 42 Bartlett and wife, dated April twenty-fifth, nineteen hundred
 and five, are particularly described as follows:

6b. All that certain tract or parcel of land and premises situated
 in the City of Atlantic City, County of Atlantic and State of New
 Jersey, bounded and described as follows:

6c. Beginning in the westerly line of New Hampshire Avenue one
 hundred and fifty feet southwardly from the southerly line of Pacific
 Avenue; thence westerly parallel with Pacific Avenue one hundred
 and sixty feet; thence northwardly parallel with New Hampshire
 Avenue one hundred feet; thence westwardly parallel with Pacific
 Avenue fifteen feet; thence southwardly parallel with New Hampshire
 and Vermont Avenues two hundred and fifty feet to the northerly
 line of Oriental Avenue; thence continuing the same course
 parallel with said New Hampshire and Vermont Avenues and crossing
 Oriental Avenue to the high water-mark of the Atlantic Ocean; thence
 northeastwardly along the high water-mark to the westerly
 line of New Hampshire Avenue; thence northwardly along the
 westerly line of New Hampshire Avenue recrossing Oriental Avenue
 to the northerly line thereof; thence still along the westerly line of
 New Hampshire Avenue one hundred and fifty feet to the place
 beginning.

Tract No. 2.

6d. Beginning at a point in the high water-line of the Atlantic
 Ocean as the same existed in May, nineteen hundred, said point being
 distant three hundred and twenty-five feet southwardly at right
 angles from the southerly line of Pacific Avenue and one hundred
 and seventy-five feet eastwardly at right angles from the easterly line
 of Vermont Avenue, and extends thence (1) southwardly
 43 parallel with Vermont Avenue and distant one hundred and
 seventy-five feet eastwardly at right angles from the easterly
 line of the same one hundred and eighty-five feet to a point in the
 easterly line of lands under water granted by the State of New Jersey
 to Walter B. Dick, December twenty-eighth, eighteen hundred and
 ninety-nine; thence (2) southeastwardly in a straight line and along
 the easterly line of lands as above granted to Walter B. Dick seven
 hundred and twenty-nine and thirty-eight one hundredths feet to
 point in the exterior line established by the Riparian Commissioners
 of the State of New Jersey, said point being distant three hundred and
 seventy-eight feet northeastwardly along said exterior line from
 where it is intersected by the easterly line of Vermont Avenue extended
 southerly; thence (3) northeastwardly along said exterior line
 curving to the left on a radius of four thousand feet, four hundred
 and ninety-four feet to a point; thence (4) northwestwardly
 in a straight line seven hundred and forty-four and thirty-nine
 hundredths feet to a point in the high water-line of the Atlantic
 Ocean where the same is intersected by the westerly line of New
 Hampshire Avenue, said point being distant two hundred and fifty

et southwardly from the south line of Pacific Avenue; thence (5) southwesterly along the said high water-line to the place of beginning.

7. This defendant charges and avers that this defendant is lawfully seized in fee simple of all that part of the lands and premises contained in the bill of complaint, which are embraced in the second tract described in paragraph 6, lying eastwardly of the easterly line of New Hampshire Avenue, and more particularly described as follows:

7a. Beginning at the intersection of the easterly line of New Hampshire Avenue with the fourth course in the above description of tract No. 2; thence extending southwardly along the easterly line of New Hampshire Avenue extended to a point in the exterior line established by the Riparian Commissioners where it is intersected by the easterly line of New Hampshire Avenue extended southwardly; thence eastwardly along said exterior line curving to the left on a radius of four thousand feet to where the said exterior line intersects the fourth course of the said description; thence northwesterly in a straight line to a point intersecting the easterly line of New Hampshire Avenue, being the place of beginning.

And this defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

WILSON & CARR,

Solicitors for Defendant Henry E. Stevens, Jr.

I consent to the filing of the within answer out of time.

R. H. INGERSOLL,

Solicitor for Complainants.

Answer.

In Chancery of New Jersey.

Between

DEWEY LAND COMPANY et als., Complainants,

and

HENRY E. STEVENS, JR., et al., Defendants.

On Bills, etc.

The Answer of James W. Northup to the Bill of Complaint of Dewey Land Company and Samuel F. Nirdlinger, Complainants.

This defendant, answering says:

1. That he admits that on or about the nineteenth day of December, nineteen hundred and four, the States Avenue Land Company

made, executed and delivered to the Dewey Land Company by Samuel F. Nirdlinger, a deed purporting to convey the lands and premises particularly described in the second paragraph of the bill of complaint, but this defendant denies that title to any portion of the said lands hereinafter particularly described in paragraph 4 of this answer thereby became vested in the complainants.

2. This defendant admits that the shore line of the said tract of land has been extended by alluvial deposits, and that the high water line of the Atlantic Ocean has been carried out, but as to the exact extent thereof this defendant is ignorant and leaves the complainants to make proof thereof.

3. This defendant admits that on or about the ninth day of December, nineteen hundred and seven, the Dewey Land Company made, executed and delivered its deed of conveyance to Samuel F. Nirdlinger, purporting to convey to the said Nirdlinger an equal undivided one-fourth part of the lands and premises particularly described in the said bill of complaint, but this defendant denies that thereby the said Nirdlinger acquired title to the portion of any of said lands particularly described in paragraph 7a of this answer.

4. This defendant admits that on or about the twentieth day of January, nineteen hundred and nine, the Dewey Land Company made, executed and delivered unto Samuel F. Nirdlinger a deed purporting to convey to the said Nirdlinger in fee simple, an equal undivided one-twelfth part in the said described lands and premises, but this defendant denies that thereby title thereto became vested in the said Nirdlinger as to any portion of the said lands and premises particularly described in paragraph 7a of this answer.

5. This defendant admits that on or about the tenth day of February, nineteen hundred and nine, the Dewey Land Company made, executed and delivered to Samuel F. Nirdlinger a deed of conveyance purporting to convey to the said Nirdlinger an equal undivided one-sixth part of the said described lands and premises, but this defendant denies that thereby title thereto became vested in the said Nirdlinger in and to any portion of the lands and premises particularly described in paragraph 7a of this answer.

6. This defendant admits that complainants' claim to title to the part of the lands described in the bill of complaint, which are embraced in the second tract described in this paragraph, is disputed by this defendant, and this defendant denies that the said complainants have title thereto. This defendant admits that no suit or action, other than this cause, is pending to enforce or test the validity of the title of this defendant. This defendant denies that the title claimed by him is without foundation, but avers the facts to be as follows:

6a. That William H. Bartlett, a single man, and Elwood S. Bartlett and wife, being then and there lawfully seized of the lands

hereinafter particularly described, did, on the eleventh day of September, nineteen hundred and two, make, execute and deliver to the Girard Trust Company, a corporation of the State of Pennsylvania, and Anita Berwind, administrators of the estate of Charles F. Berwind, deceased, a certain indenture of mortgage conditioned for the payment of the sum of twenty-five thousand dollars, at the expiration of three years from the date thereof, upon the lands and premises hereinafter particularly described, which said mortgage was afterwards assigned, transferred and set over by the said Girard Trust Company, and Anita Berwind, administrators of the estate of Charles F. Berwind, as aforesaid, to the Girard Trust Company, attorney for the heirs of Charles F. Berwind, deceased, by deed of assignment dated the thirty-first day of December, nineteen hundred and seven, and recorded in the clerk's office of the County of Atlantic, in Book 25 of Assignments of Mortgages, at page 279, and which said mortgage was afterwards assigned, transferred and set over by the said Girard Trust Company, attorney as aforesaid, to this defendant, James Northrup, by deed of assignment, dated the eighth day of May, nineteen hundred and eight, and recorded in the said clerk's office in Book 25 of Assignments of Mortgages, at page 413, and that by virtue thereof, this defendant lawfully claims a lien upon the lands and premises particularly described in the said mortgage. And this defendant further avers that a fee simple title to such portion of the said lands as lie below the high water line of the Atlantic Ocean was vested in the said William H. Bartlett and Elwood S. Bartlett by a grant from the State of New Jersey by its deed of conveyance or grant dated the twenty-eighth day of June, nineteen hundred, and recorded in the office of the clerk of the County of Atlantic in Book 248 of Deeds, at page 475. That the lands and premises mortgaged by the said William H. Bartlett and Elwood S. Bartlett and wife, by mortgage dated September eleventh, nineteen hundred and two, are particularly described as follows:

6b. All that certain tract or parcel of land and premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

6c. Beginning in the westerly line of New Hampshire Avenue, two hundred and fifty feet southwardly from the southerly line of Pacific Avenue; thence westwardly parallel with Pacific Avenue one hundred and sixty feet; thence northwardly parallel with New Hampshire Avenue one hundred feet; thence westerly parallel with Pacific Avenue fifteen feet; thence southwardly parallel with New Hampshire and Vermont Avenues two hundred and fifty feet to the northerly line of Oriental Avenue; thence continuing the same course parallel with said New Hampshire and Vermont Avenues and crossing Oriental Avenue to the high water mark of the Atlantic Ocean; thence northeastwardly along the high water mark to the westerly line of New Hampshire Avenue; thence northwardly along

the westerly line of New Hampshire Avenue, recross
 49 Oriental Avenue to the northerly line thereof; thence
 along the westerly line of New Hampshire Avenue one hundred and fifty feet to the place of beginning.

Tract No. 2.

6d. Beginning at a point in the high water line of the Atlantic Ocean as the same existed in May, nineteen hundred, said point being distant three hundred and twenty-five feet southwardly at right angles from the southerly line of Pacific Avenue and one hundred and seventy-five feet eastwardly at right angles from the easterly line of Vermont Avenue, and extends thence (1) southwardly parallel with Vermont Avenue and distant one hundred and seventy-five feet eastwardly at right angles from the easterly line the same one hundred and eighty-five feet to a point in the easterly line of lands under water granted by the State of New Jersey to Walter B. Dick, December twenty-eighth, eighteen hundred and ninety-nine; thence (2) southeastwardly in a straight line and along the easterly line of lands as above granted to Walter B. Dick, seven hundred and twenty-nine and thirty-eight one hundredths feet to a point in the exterior line established by the riparian commissioners of the State of New Jersey, said point being distant three hundred and seventy-eight feet northeastwardly along said exterior line from where it is intersected by the easterly line of Vermont Avenue extended southerly; thence (3) northeastwardly along said exterior line curving to the left on a radius of four thousand feet, four hundred and ninety-four feet to a point; thence (4) northwestwardly in a straight line seven hundred and forty-four and thirty-nine hundredths feet to a point in the high water line of the Atlantic Ocean where the same is intersected by the westerly line of New Hampshire Avenue, said point being distant two hundred and fifty feet southwardly from the south line of Pacific Avenue; thence (5) southwestwardly along said high water line to the place of beginning.

50 New Hampshire Avenue, said point being distant two hundred and fifty feet southwardly from the south line of Pacific Avenue; thence (5) southwestwardly along said high water line to the place of beginning.

7. And this defendant denies that the complainants have a title, lien, claim or demand whatsoever upon that portion of the mortgaged premises particularly described in the bill of complaint and more particularly described as follows:

7a. Beginning at the intersection of the easterly line of New Hampshire Avenue with the fourth course in the above description of tract No. 2; thence extending southwardly along the easterly line of New Hampshire Avenue extended to a point in the exterior line established by the riparian commissioners where it is intersected by the easterly line of New Hampshire Avenue extended southwardly; thence eastwardly along said exterior line curving to the left on a radius of four thousand feet to where the said exterior line intersects the fourth course of the said description; thence northwestwardly in a straight line to a point intersecting the easterly line of New Hampshire Avenue, being the place of beginning.

And this defendant humbly prays to be hence dismissed with reasonable costs and charges in this behalf most wrongfully sustained.

WILSON & CARR,
Solicitors for Defendant, James W. Northup.

I consent to the filing of the within answer out of time.

R. H. INGERSOLL,
For Complainants.

EXHIBIT D.

In Chancery of New Jersey.

Between

DEWEY LAND COMPANY and SAMUEL F. NIRDLINGER, Complainants,
and

HENRY E. STEVENS, JR., and JAMES W. NORTHUP, Defendants.

On Bill, etc.

Replication.

The Replication of Dewey Land Company and Samuel F. Nirdlinger, Complainants, to the Answer of Henry E. Stevens, Jr., and James W. Northup, Defendants.

The complainants join issue on the answers of the defendants.

ROBERT H. INGERSOLL,
Solicitor for and of Counsel with Dewey Land Co.
C. L. GOLDENBERG,
Solicitor for and of Counsel with Samuel F. Nirdlinger.

Service of a copy of within replication is hereby acknowledged this 6th day of September, 1910, and consent is hereby given to file same out of time.

WILSON & CARR,
Solicitors for Henry E. Stevens, Jr., and James W. Northup.

EXHIBIT E.

In Chancery of New Jersey.

Between

DEWEY LAND COMPANY et al., Complainants,
and

HENRY E. STEVENS, JR., et al., Defendants.

On Bill, etc.

Order Dismissing Bill.

This matter coming on to be heard on the second day of February nineteen hundred and twelve, in the presence of Robert H. Ingersoll and George A. Bourgeois, of counsel with the complainants, and Wilson & Carr, of counsel with the defendants; and the court having heard and considered the proofs, and the arguments of respective counsel; and it appearing to the satisfaction of the court that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill of complaint contained and set forth, and that said bill ought to be dismissed with costs;

It is thereupon on this seventh day of September, nineteen hundred and twelve, on motion of Wilson & Carr, solicitors for and counsel with the defendants, Ordered that the complainants' bill of complaint be and the same is hereby dismissed with costs.

And it is further ordered that a fee of one hundred and fifty dollars be and the same is hereby allowed to the solicitors of the defendants, and the same to be taxed as part of the costs of this bill and to be collectible therewith.

E. R. WALKER, C.

EXHIBIT F.

New Jersey Court of Errors and Appeals.

Between

DEWEY LAND COMPANY et als. (Complainants), Appellants,
and

HENRY E. STEVENS, JR., et al. (Defendants), Respondents.

Decree of Affirmance and Remittitur.

This cause having been brought to a hearing on appeal from the Court of Chancery, at the June Term, 1913, of this court, and George A. Bourgeois and Coulomb, of counsel with the appellants, and Wilson & Carr, of counsel with the respondents, having been heard, and

the questions brought up by the said appeal having been duly considered:

It is, on this Fifteenth day of June, nineteen hundred and fourteen, ordered, adjudged and decreed, that the decree of the Court of Chancery made on the seventh day of September, nineteen hundred and twelve, which is appealed from by the appellants, be and the same is hereby in all things affirmed, with costs in this court and the Court of Chancery, to be paid by the appellants, and that the petition of appeal be dismissed.

And it is further ordered, that the record be remitted to the Court of Chancery to proceed further thereon according to law and the practice of said court.

On motion of

WILSON & CARR,
Solicitors of Respondents.

Endorsed: "Filed Jun. 24, 1914. David S. Crater, Clerk."

Amendment to Answer.

United States District Court for the District of New Jersey.

Between

SAMUEL F. NIRDLINGER, Complainant,

and

HENRY E. STEVENS, JR., Defendant.

On Bill, &c.

Amendment to Answer.

The answer is hereby amended in the following particulars: Paragraph 5d is stricken out and a new paragraph No. 10 is inserted, following the present paragraph 9, and reads as follows:

10. I do further show that the complainant herein is barred from any relief as to the matters and things set forth in the said bill, including all relief therein prayed for, because the said complainant was both a party to and privy in the estate with the complainant in the said suit in the New Jersey Court of Chancery, and that the said decree of the New Jersey Court of Chancery, affirmed by the New Jersey Court of Errors and Appeals, is res judicata of all matters in controversy herein, including the complainant's prayer that:

"The cloud upon the title of your orator to said lands and premises created and occasioned by the alleged riparian grant hereinabove referred to, and the deed of conveyance from William H. Bartlett and Elwood S. Bartlett and wife to the defendant hereinabove referred to may be, so far as said lands and premises are concerned,

declared and decreed to be null and void, and of no effect as against your orator, and that your orator's right in and title to said lands and premises may be decreed to be relieved from the lien or cloud occasioned by said alleged riparian grant and deed of conveyance, and that the said defendant, Henry E. Stevens, Jr., may be likewise decreed to have no title or interest in or to said lands and premises by reason of said alleged riparian grant and deed,"

and that the said decree of the New Jersey Court of Chancery established a title in the defendant herein to the lands particularly described in paragraph 4e, superior to and in exclusion to that of the complainant. And I do further show that the alleged "cloud" upon the title of the complainant is a riparian grant made by the State of New Jersey, and that the said riparian grant was set up by the defendant, in the said suit in the New Jersey Court of Chancery, as the basis of this defendant's title to the lands and premises particularly described in paragraph 4e, and the validity of said riparian grant was therein established, and the complainant's bill was dismissed after a full hearing upon the merits involving the consideration of the present alleged cloud upon the complainant's title.

And I pray that the Court may call up and dispose of the defense of res judicata prior to final hearing.

WILSON & CARR,
Attorneys for Defendant.

We hereby consent to the filing of the within amendment.

BOURGEOIS & COULOMB,
Attorneys for Complainant.

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Order.

United States District Court for the District of New Jersey.

Between

SAMUEL F. NIRDLINGER, Complainant,

and

HENRY E. STEVENS, JR., Defendant.

On Bill, &c.

Order.

It is, on this tenth day of May, A. D. nineteen hundred and fifteen, on motion of Bourgeois & Coulomb, solicitors for and of counsel with complainant, Ordered, Adjudged and Decreed that paragraph 7 of the bill of complaint heretofore filed in the above cause be and the same is hereby amended to read as follows:

“7. That the said claim of the said Henry E. Stevens, Jr., of title to, lien upon and interest in said land and premises by reason aforesaid is invalid and void; that the said riparian commissioners had no right to make said grant, and the same is of no effect against your orator; that the said riparian grant, if held valid as against your orator, would violate the constitution of the State of New Jersey and of the United States by appropriating and taking property of your orator without due process of law or payment of any compensation to your orator as the true owner thereof.

Your orator further charges that even if said riparian commissioners of the State of New Jersey, at the time of making said alleged conveyance, had any authority whatsoever to make the same, which your orator denies, said riparian commissioners, notwithstanding, exceeded such authority in the alleged grant aforesaid to the said Henry E. Stevens, Jr., and included therein lands and premises being part of the premises hereinbefore particularly described, the title to the westerly ninety feet of said lands and premises, bounding along New Hampshire Avenue, being in the States Avenue Land Company by virtue of a deed made by the Atlantic City Beach Front Improvement Company to the States Avenue Land Company, dated May twenty-fifth, nineteen hundred and recorded May twenty-eighth, nineteen hundred, in Book 244 of Deeds, page 418, in the office of the clerk of Atlantic County, and the title to the easterly one hundred feet, bounding along the westerly ninety feet of said lands above mentioned and described, being in Charles G. Henderson, Jr., J. Franklin Moss and John C. Hancock, under and by virtue of a deed made by the Atlantic City Beach Front Improvement Company to the said Charles G. Henderson, Jr., J. Franklin Moss and John C. Hancock, dated November first, eighteen hundred and ninety-nine, and recorded November sixth, eighteen hundred and ninety-nine, in Book 237 of Deeds, page 208, in the office of the clerk of Atlantic County, all of whom were predecessors in title of your orator to said lands, and to whose title your orator succeeded by virtue of the deeds above set forth and referred to. And your orator expressly avers and charges that the said riparian commissioners, by virtue of said ownership of the said Charles G. Henderson, Jr., J. Franklin Moss and John C. Hancock and States Avenues Land Company, had no authority or right whatsoever to make the deed to the said William H. Bartlett and Elwood S. Bartlett, above referred to, and said deed is without force and effect as against your orator's title to said lands and premises.”

We consent to the making of the above order.

WILSON & CARR,
Solicitors of Defendant.

Order to Amend.

United States District Court for the District of New Jersey.

In Equity.

Between

SAMUEL F. NIRDLINGER, Complainant,

and

HENRY E. STEVENS, JR., Defendant.

Order to Amend.

This matter being opened to the Court by Bourgeois and Coulomb, of counsel with complainant.

It is, on this — day of October, 1915, Ordered that complainant's bill of complaint be amended by striking out paragraph 1½ thereof and inserting in place and stead thereof the following:

1½. And your orator further shows unto your Honor that the above described premises are the same premises conveyed to Chalkley S. Leeds et ux. to Robert B. Leeds by deed dated August 2, 1852, duly recorded in the clerk's office of Atlantic County in Book G, pages 1007-1028, as follows:

Beginning on Absecon Beach North 64¼ degrees East 14½ chains from the Southeast corner of William Chamberlain by edge of surf and extending thence North 44¾ degrees West 63.60 chains
thence North 13½ degrees East 23½ chains; thence North
61 80¼ degrees East 6½ chains; then South 68½ degrees East
19.30 chains along the inlet; thence South 32½ degrees East
31.60 chains binding by Absecon Inlet; thence South 14 degrees
East 31½ chains on the same to surf; thence * * * 64¼ de-
grees West 15.20 chains along the surf to the place of beginning.

And deed between Chalkley S. Leeds, Robert B. Leeds and others dedicating Pacific Avenue, New Hampshire Avenue, Vermont Avenue, Maine Avenue, and other avenues, dated April 15, 1853, recorded in the clerk's office of Atlantic County in Book H, page 177, to

And by Robert B. Leeds, et ux., to John McClees by deed dated July 9, 1856, recorded in the clerk's office of Atlantic County in book I, page 425, as follows:

Beginning in the South edge of Pacific Avenue and in line of Camden and Atlantic Land Company, and extending thence along said Avenue North 67 degrees East 13.35 chains to line of said land company; thence by same South 44½ degrees East 5.1 chains to edge of Absecon Inlet; thence South 23½ degrees West 6.7 chains along the edge of said Inlet; thence still along same South 40 de-

degrees West 6.7 chains to line of said Land Company; thence along same North 44 degrees West 13.9 chains to the place of beginning.

And by John McClees to the Atlantic City Beach Front Improvement Company by deed dated March 9, 1897, recorded in the clerk's office of Atlantic County in Book 211, page 147, as follows:

Beginning on the Southerly side of Pacific Avenue, 175 feet East of Vermont Avenue, and extending thence East 746 feet, more or less, to line of Camden and Atlantic Land Company; thence South $44\frac{1}{2}$ degrees East by same 336 feet, more or less, to edge of Absecon Inlet; thence South by high water mark of Absecon Inlet and the Atlantic Ocean 1,024 feet, more or less, to point 175 feet East of Vermont Avenue; thence North parallel with Vermont Avenue 650 feet, more or less, to the place of beginning.

Except the following lot:

Beginning on the West side of New Hampshire Avenue 150 feet South of Pacific Avenue, and extending thence West parallel with Pacific Avenue 150 feet; thence South parallel with New Hampshire Avenue 100 feet; thence East parallel with Pacific Avenue 160 feet to New Hampshire Avenue; thence North by same 100 feet to beginning.

And by Atlantic City Beach Front Improvement Company to Charles G. Henderson, Jr., J. Franklin Moss and John C. Hancock by deed dated November 1, 1899, recorded in the clerk's office of Atlantic County in Book 237, page 208, as follows:

Beginning in the South line of Pacific Avenue, 280 feet East of New Hampshire Avenue, and extending thence East by Pacific Avenue (crossing Main Avenue) to line of land now or late of the Camden and Atlantic Land Company; thence South $44\frac{1}{2}$ degrees East by said line 336 feet, more or less, to Absecon Inlet or Atlantic Ocean; thence South by high water mark of said Inlet and Ocean to point 90 feet East of New Hampshire Avenue, if extended; thence North, parallel with New Hampshire Avenue (crossing Oriental Avenue 60 feet wide and Dewey Place 50 feet wide) to a point 100 feet South of Pacific Avenue; thence East parallel with Pacific Avenue 190 feet; thence North parallel with New Hampshire Avenue 100 feet to beginning.

And by Atlantic City Beach Front Improvement Company to States Avenue Land Company by deed dated May 24, 1900, recorded in the clerk's office of Atlantic County in Book 244, page 418, as follows:

Beginning in the East line of New Hampshire Avenue, 240 feet South from Pacific Avenue and at the Southeast corner of Dewey Place (50 feet wide), and extending thence South along New Hampshire Avenue 160 feet more or less, to high water mark of Atlantic Ocean; thence East by same to point 90 feet East of New Hampshire Avenue; thence North parallel with New Hampshire

Avenue, 160 feet, more or less, to the South line of said Place; thence West by same 90 feet to beginning.

And by Charles G. Henderson, Jr., et ux., et al., to Roland Conrow by deed dated April 14, 1903, recorded in the clerk's office of Atlantic County in Book 287, page 76, as follows:

Beginning in the South line of Pacific Avenue, 280 feet East of New Hampshire Avenue, and extending thence East along Pacific Avenue 120 feet to the West line of Maine Avenue; thence South along same 460 feet, more or less, to high water line of 64 Ocean; thence in line of Maine Avenue extended to high water line of the Ocean as in 1856; thence South along same to point 90 feet East of New Hampshire Avenue, extended; thence North, parallel with same and 90 feet therefrom to the South line of said Place; thence East by same 190 feet; thence North parallel with Maine Avenue crossing said Place 240 feet to beginning.

And by Roland Conrow, et ux., to States Avenue Land Company by deed dated April 14, 1903, recorded in the clerk's office of Atlantic County in Book 286, page 113, as follows:

Beginning in the South line of Dewey Place, 90 feet East of New Hampshire Avenue, and extending thence East along Dewey Place 100 feet by South 350 feet, more or less, to present high water mark in the Atlantic Ocean, and still oceanward to high water mark as it existed in 1856.

And by States Avenue Land Company to Dewey Land Company by deed dated December 19, 1904, recorded in the clerk's office of Atlantic County in Book 313, page 363, as follows:

Beginning in the East line of New Hampshire Avenue, 240 feet South from Pacific Avenue, said beginning point being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East, parallel, with Pacific Avenue, and along the South line of said place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to high water line of the Atlantic Ocean; thence Southwest along same the several courses and distances thereof to the East line of New Hampshire 65 Avenue; thence North along same 438 feet, more or less, to beginning.

And by Dewey Land Company to Samuel F. Nirdlinger by deed dated December 9, 1907, recorded in the clerk's office of Atlantic County in Book 382, page 19, as follows:

Undivided one-fourth interest in:

Beginning in the East line of New Hampshire Avenue 240 feet South from Pacific Avenue, being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East parallel with Pacific Avenue, along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 294

feet, more or less, to high water line of Atlantic Ocean; thence Southwest along same the several courses, &c., to the East line of New Hampshire Avenue; thence North by same 438 feet, more or less, to beginning.

And by Dewey Land Company to Samuel F. Nirdlinger, by deed dated January 20, 1909, recorded in the clerk's office of Atlantic County in Book 395, page 271, conveying an undivided one-twelfth interest, as follows:

Beginning in the East line of New Hampshire Avenue, 240 feet South from the South line of Pacific Avenue, said point being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East parallel with Pacific Avenue and along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to the high water line of the Atlantic Ocean; thence Southwest along said high water line of the Atlantic Ocean the several courses and distances thereof to the Easterly line of New Hampshire Avenue; thence North along the East line of New Hampshire Avenue 438 feet, more or less, to beginning.

And by Dewey Land Company to Samuel F. Nirdlinger, by deed dated February 10, 1909, recorded in the clerk's office of Atlantic County in Book 398, page 116, conveying an undivided one-sixth interest, as follows:

Beginning in the East line of New Hampshire Avenue 240 feet South from the South line of Pacific Avenue, said point being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East, parallel with Pacific Avenue and along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to high water line of the Atlantic Ocean; thence Southwest along said high water line of the Atlantic Ocean the several courses thereof to the Easterly line of New Hampshire Avenue; thence North along the East line of New Hampshire Avenue 438 feet, more or less, to beginning.

And by Dewey Land Company to Samuel F. Nirdlinger by deed dated December 3, 1909, recorded in the clerk's office of Atlantic County in Book 107, page 142, conveying an undivided one-half interest as follows:

Beginning in the East line of New Hampshire Avenue, 240 feet South from Pacific Avenue, said point being this Southeast corner of New Hampshire Avenue and Dewey Place; thence East parallel with Pacific Avenue and along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 545 feet more or less to the high water line of Atlantic Ocean; thence Southwest along high water line of Atlantic Ocean the several courses and distances thereof to the East line of New Hampshire Avenue; thence North along said line of New Hampshire Avenue 558 feet more or less to beginning.

And by Dewey Land Company to Louis E. Stern by deed dated July 17, 1912, recorded in the clerk's office of Atlantic County in Book 486, page 443, quit-claiming the following:

Beginning at the intersection of the South line of Dewey Place with the East line of New Hampshire Avenue, and extending thence East along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 350 feet, more or less, to high water line of Atlantic Ocean as it existed on April 14th, 1903; thence East at right angles to high water line of the Atlantic Ocean as it existed in 1856, 770 feet, more or less, to said high water line as it then existed; thence Southwest along the high water line of the Atlantic Ocean as — existed in 1856 to point in said high water line where the same would be intersected by the East line of New Hampshire Avenue extended thence North in the East line of New Hampshire Avenue, extended, 1,120 feet, more or less, to beginning.

And by Samuel F. Nirdlinger to Louis E. Stern by deed dated July 17, 1912, recorded in the clerk's office of Atlantic County in Book 486, page 445, as follows:

68 Beginning at the intersection of the South line of Dewey Place with the East line of New Hampshire Avenue, and extending thence East along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 1,120 feet, more or less, to high water line of the Atlantic Ocean, as it existed in 1856; thence Southwest along said high water line to intersection of the East line of New Hampshire Avenue, extended; thence North along the East line of New Hampshire Avenue extended, 1,120 feet, more or less, to beginning.

And by Louis E. Stern to Samuel F. Nirdlinger by deed dated July 17, 1912, recorded in the clerk's office of Atlantic County in Book 486, page 447, conveying an equal undivided one-half interest as follows:

Beginning at the intersection of the South line of Dewey Place with the East line of New Hampshire Avenue, and extending thence East in the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 350 feet, more or less, to high water line of the Atlantic Ocean as it existed on April 14th, 1903; thence East at right angles to high water line of the Atlantic Ocean as it existed in 1856, 770 feet, more or less, to high water line as it then existed; thence Southwest along the high water line of the Atlantic Ocean as it existed in 1856 to point in said high water line where the same would be intersected by the East line of New Hampshire Avenue, extended; thence North in the East line of New Hampshire Avenue, extended, 1,120 feet, more or less, to beginning.

69 And by Louis E. Stern to Dewey Land Company by deed dated July 17, 1912, recorded in the clerk's office of Atlantic County in Book 486, page 450, conveying an undivided one-half interest, as follows:

Beginning at the intersection of the South line of Dewey Place with the East line of New Hampshire Avenue, and extending thence East in the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 350 feet, more or less, to the high water line of the Atlantic Ocean as it existed on April 14th, 1903; thence East at right angles to the high water line of the Atlantic Ocean as it existed in 1856, 770 feet, more or less, to said high water line as it then existed; thence Southwest along the high water line of the Atlantic Ocean as it existed in 1856 to point in said high water line where same would be intersected by the East line of New Hampshire Avenue extended; thence North in the East line of New Hampshire Avenue extended 1,120 feet, more or less, to beginning; a portion of the lands described in the deed from Chalkley S. Leeds to Robert B. Leeds aforesaid having been washed away by the ocean and partly regained by the gradual, imperceptible increase therefrom.

And by Dewey Land Company to Samuel F. Nirdlinger by deed dated February 4, 1914, recorded in the clerk's office of Atlantic County in Book 523, page 47, conveying an undivided one-half interest in the lands last above described.

That your orator shortly subsequent to the time he received the first deed conveying one-fourth thereof in 1907, paid on behalf of himself and the Dewey Land Company, the taxes assessed upon the said premises, and assessment for street improvements abutting thereon, all of which were assessed and levied in the name of the Dewey Land Company and your orator, and the said premises were from time to time improved by grading, filling, curbing and paving, and the erection of jetties for the purpose of protecting same from the inroads of the sea, the cost and expense whereof was paid by your orator, whereby and in consequence whereof the said Dewey Land Company became indebted to your orator in a large sum, until finally on or about the fourth day of February, 1914, in consideration of the said indebtedness and the further sum paid by your orator, the said Dewey Land Company conveyed to your orator its remaining undivided one-half of said premises as hereinabove set forth, whereby your orator became seized and possessed of the whole thereof.

We consent to the making and filing of above amendment.

WILSON & CARR,
Solicitors of Defendant.

Order.

United States District Court for the District of New Jersey.

In Equity.

SAMUEL F. NIRDLINGER, Plaintiff,

vs.

HENRY E. STEVENS, JR., Defendant.

Order.

It is, on this ninth day of October, on motion of Wilson and Carr, attorneys for the defendant, Ordered that defendant be given leave to file forthwith an answer to the amendment to paragraph 1 of the bill of complaint, which amendment was filed October 9, 1917.

1. I deny that in 1852 the distance between the southerly line of Pacific Avenue and the high water mark of the Atlantic Ocean measured southerly along the line of New Hampshire Avenue, as then and now mapped, was 1,600 feet, and am informed, in such a manner that I believe it to be true, that the high water mark of the Atlantic Ocean, where it crossed New Hampshire Avenue was approximately 350 to 400 feet south of Pacific Avenue. I admit that all lands above such high water mark were high, fast beach lands.

72 I deny that during a succession of severe northeast storms which continued for two or three days and sometimes as long as one week, land was washed and cut away from said high fast beach lands, and I deny that each storm made great inroads thereon of from 75 to 200 feet; and I deny that there were any considerable losses of land due to evulsion and aver that such losses, if any, as occurred from time to time were due to erosion. I admit that there has been a gradual gain by accretion from time to time, and that at the present time the high water mark is far southward of the high water mark in 1900. I deny, however, that by reason of any accretions or otherwise, the plaintiff acquired any title whatever to the lands described in paragraph 4c of the answer.

Complainant's Answer to Counterclaim.

United States District Court for the District of New Jersey.

In Equity.

Between

SAMUEL F. NIRDLINGER, Complainant,

and

HENRY E. STEVENS, JR., Defendant.

Complainant's Answer to Counterclaim.

The Answer of the Above-named Complainant to the Counter-claim of Defendant in the Above-stated Cause.

73 In answer to said counter-claim, I, Samuel F. Nirdlinger, say:

1. I deny that this present suit is vexatious and without just cause, and deny that it is intended to unduly annoy and embarrass the said defendant, and deny that defendant's title has been established to the land therein involved by the court of last resort of the State of New Jersey, and deny that my claim is an unfounded claim, and say that defendant gained no title by virtue of the riparian grant on which he relies, and further say that the State of New Jersey was without power to make a grant of the lands claimed by me in my bill of complaint, title to which lands was derived by me through the following instruments:

Deed from Chalkley S. Leeds, et ux., to Robert B. Leeds dated August 25, 1852, duly recorded in the clerk's office of Atlantic County in Book G, pages 1007-1028, as follows:

Beginning on Absecon Beach North $64\frac{1}{4}$ degrees East 14.10 chains from the Southeast corner of William Chamberlain by edge of surf, and extending thence North $44\frac{3}{4}$ degrees West 63.60 chains; thence North $13\frac{1}{2}$ degrees East $23\frac{1}{2}$ chains; thence North $80\frac{1}{4}$ degrees East $6\frac{1}{2}$ chains; thence South $68\frac{1}{2}$ degrees East 19.30 chains along the inlet; thence South $32\frac{1}{2}$ degrees East 31.60 chains *binding* by Absecon Inlet; thence South 14 degrees East $31\frac{1}{2}$ chains on the same surf; thence— $64\frac{1}{4}$ degrees West 15.20 chains along the surf to the place of beginning.

Deed between Chalkley S. Leeds, Robert B. Leeds and others, dedicating Pacific Avenue, New Hampshire Avenue, Vermont Avenue, Maine Avenue, and other avenues, dated April 15, 1853, recorded in the clerk's office of Atlantic County in Book H, page 177, &c.

Deed from Robert B. Leeds, et ux., to John McClees dated Jan. 9, 1856, recorded in the clerk's office of Atlantic County in Book 425, as follows:

Beginning in the South edge of Pacific Avenue and in line of Camden and Atlantic Land Company, and extending thence along said Avenue North 67 degrees East 13.35 chains to line of said Land Company; thence by same South $44\frac{1}{2}$ degrees East 5.1 chains to edge of Absecon Inlet; thence South $23\frac{1}{2}$ degrees West 6.7 chains along the edge of said Inlet; thence still along same South 40 degrees West 6.7 chains to line of said Land Company; thence along same North 44 degrees West 13.9 chains to the place of beginning.

Deed from John McClees to the Atlantic City Beach Front Improvement Company, dated March 9, 1897, recorded in the clerk's office of Atlantic County in Book 211, page 147, as follows:

Beginning on the Southerly side of Pacific Avenue, 175 feet East of Vermont Avenue, and extending thence East 746 feet more or less, to line of Camden and Atlantic Land Company; thence South $44\frac{1}{2}$ degrees East by same 336 feet, more or less, to edge of Absecon Inlet; thence South by high water mark of Absecon Inlet and the Atlantic Ocean 1,024 feet, more or less, to point 175 feet East of Vermont Avenue; thence North parallel with Vermont Avenue 67 feet, more or less to the place of beginning.

75 Except the following lot:

Beginning on the West side of New Hampshire Avenue 150 feet South of Pacific Avenue, and extending thence West parallel with Pacific Avenue 160 feet; thence South parallel with New Hampshire Avenue 100 feet; thence East parallel with Pacific Avenue 160 feet to New Hampshire Avenue; thence North by same 100 feet to beginning.

Deed from Atlantic City Beach Front Improvement Company to Charles G. Henderson, Jr., J. Franklin Moss and John C. Hancock dated November 1, 1899, recorded in the clerk's office of Atlantic County in Book 237, page 208, as follows:

Beginning in the South line of Pacific Avenue, 280 feet East of New Hampshire Avenue, and extending thence East by Pacific Avenue (crossing Maine Avenue) to line of land now or late of the Camden and Atlantic Land Company; thence South $44\frac{1}{2}$ degrees East by said line 336 feet, more or less, to Absecon Inlet or Atlantic Ocean; thence South by high water mark of said Inlet and Ocean to point 90 feet East of New Hampshire Avenue, if extended; thence North, parallel with New Hampshire Avenue (crossing Oriental Avenue 60 feet wide and Dewey Place 50 feet wide) to a point 10 feet South of Pacific Avenue; thence East parallel with Pacific Avenue 190 feet; thence North parallel with New Hampshire Avenue 100 feet to beginning.

Deed from Atlantic City Beach Front Improvement Company to States Avenue Land Company dated May 24, 1900, recorded in the clerk's office of Atlantic County in Book 244, page 418, as follows:

Beginning in the East line of New Hampshire Avenue, 240 feet South from Pacific Avenue and at the Southeast corner of Dewey Place (50 feet wide), and extending thence South along New Hampshire Avenue 160 feet more or less, to high water mark of Atlantic Ocean; thence East by same to point 90 feet East of New Hampshire Avenue; thence North parallel with New Hampshire Avenue, 160 feet, more or less to the South line of said Place; thence West by same 90 feet to beginning.

Deed from Charles G. Henderson, Jr., et ux., et al., to Roland Conrow, dated April 14, 1903, recorded in the clerk's office of Atlantic County in Book 287, page 76, as follows:

Beginning in the South line of Pacific Avenue, 280 feet East of New Hampshire Avenue, and extending thence East along Pacific Avenue 120 feet to the West line of Maine Avenue; thence South along same 460 feet, more or less, to high water line of Ocean; thence in line of Maine Avenue extended to high water line of the Ocean as in 1856; thence South along same to point 90 feet East of New Hampshire Avenue, extended; thence North, parallel with same and 90 feet therefrom to the South line of said Place; thence East by same 190 feet; thence North parallel with Maine Avenue crossing said Place 240 feet to beginning.

Deed from Roland Conrow, et ux., to States Avenue Land Company, dated April 14, 1903, recorded in the clerk's office of Atlantic County in Book 286, page 113, as follows:

Beginning in the South line of Dewey Place, 90 feet East of New Hampshire Avenue, and extending thence East along Dewey Place 100 feet by South 350 feet, more or less, to present high water mark in the Atlantic Ocean, and still oceanward to high water mark as it existed in 1856.

Deed from States Avenue Land Company to Dewey Land Company, dated December 19, 1904, recorded in the clerk's office of Atlantic County in Book 313, page 363, as follows:

Beginning in the East line of New Hampshire Avenue, 240 feet South from Pacific Avenue, said beginning point being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East, parallel with Pacific Avenue, and along the South line of said place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to high water line of the Atlantic Ocean; thence Southwest along same the several courses and distances thereof to the East line of New Hampshire Avenue; thence North along same 438 feet, more or less, to beginning.

Deed from Dewey Land Company to Samuel F. Nirdlinger, dated December 9, 1907, recorded in the clerk's office of Atlantic County in Book 382, page 19, as follows:

Undivided one-fourth interest in the following:

Beginning in the East line of New Hampshire Avenue, 240 feet South from Pacific Avenue, being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East, parallel with Pacific Avenue, along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to high water line of Atlantic Ocean; thence Southwest along same the several courses &c., to the East line of New Hampshire Avenue; thence North to same 438 feet, more or less, to beginning.

Deed from Dewey Land Company to Samuel F. Nirdlinger, dated January 20, 1909, recorded in the clerk's office of Atlantic County in Book 395, page 271, conveying an undivided one-twelfth interest as follows:

Beginning in the East line of New Hampshire Avenue, 240 feet South from the South line of Pacific Avenue, said point being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East parallel with Pacific Avenue and along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to the high water line of the Atlantic Ocean; thence Southwest along said high water line of the Atlantic Ocean the several courses and distances thereof to the Easterly line of New Hampshire Avenue; thence North along the East line of New Hampshire Avenue 438 feet, more or less, to beginning.

Deed from Dewey Land Company to Samuel F. Nirdlinger, dated February 10, 1908, recorded in the clerk's office of Atlantic County in Book 398, page 116, conveying an undivided one-sixth interest as follows:

Beginning in the East line of New Hampshire Avenue, 240 feet South from the South line of Pacific Avenue, said point being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East, parallel with Pacific Avenue and along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to high water line of the Atlantic Ocean; thence Southwest along said high water line of the Atlantic Ocean the several courses thereof to the Easterly line of New Hampshire Avenue; thence North along the East line of New Hampshire Avenue 438 feet, more or less, to beginning.

Deed from Dewey Land Company to Samuel F. Nirdlinger, dated December 3, 1909, recorded in the clerk's office of Atlantic County in Book 107, page 142, conveying an undivided one-half interest as follows:

Beginning in the East line of New Hampshire Avenue, 240 feet South from Pacific Avenue, said point being the Southeast corner of New Hampshire Avenue and Dewey Place; thence East parallel with Pacific Avenue and along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 545 feet more or less to the high water line of Atlantic Ocean; thence Southwest along high water line of Atlantic Ocean the several courses and distances thereof to the East line of New Hampshire Avenue; thence North along said line of New Hampshire Avenue 558 feet more or less to beginning.

Quit-claim deed from Dewey Land Company to Louis E. Stern, dated July 17, 1912, recorded in the clerk's office of Atlantic County in Book 486, page 443, as follows:

Beginning at the intersection of the south line of Dewey Place with the East line of New Hampshire Avenue, and extending thence East along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 350 feet, more or less, to high water line of Atlantic Ocean as it existed on April 14th, 1903; thence East at right angles to high water line of the Atlantic Ocean as it existed in 1856, 770 feet, more or less, to said high water line as it then existed; thence Southwest along the high water line of the Atlantic Ocean as existed in 1856 to point in said high water line where the same would be intersected by the East line of New Hampshire Avenue extended thence North in the East line of New Hampshire Avenue, extended 1,120 feet, more or less, to beginning.

Deed from Samuel F. Nirdlinger to Louis E. Stern, dated July 17, 1912, recorded in the clerk's office of Atlantic County in Book 486, page 445, as follows:

Beginning at the intersection of the South line of Dewey Place with the East line of New Hampshire Avenue, and extending thence East along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 1,120 feet, more or less, to high water line of the Atlantic Ocean, as it existed in 1856; thence Southwest along said high water line to intersection of the East line of New Hampshire Avenue extended; thence North along the East line of New Hampshire Avenue extended, 1,120 feet, more or less, to beginning.

Deed from Louis E. Stern to Samuel F. Nirdlinger, dated July 17, 1912, recorded in the clerk's office of Atlantic County in Book 486, page 447, conveying an equal undivided one-half interest, as follows:

Beginning at the intersection of the South line of Dewey Place with the East line of New Hampshire Avenue, and extending thence East in the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 350 feet, more or less, to high water line of the Atlantic Ocean as it existed on April 14th, 1903; thence East at right angles to high water line of the Atlantic Ocean

as it existed in 1856, 770 feet, more or less, to high water line as then existed; thence Southwest along the high water line of the Atlantic Ocean as it existed in 1856 to point in said high water line where the same would be intersected by the East line of New Hampshire Avenue extended; thence North in the East line of New Hampshire Avenue, extended, 1,120 feet, more or less, to beginning

Deed from Louis E. Stern to Dewey Land Company dated July 17, 1912, recorded in the clerk's office of Atlantic County in Book 486, page 450, conveying an undivided one-half interest, as follows:

Beginning at the intersection of the South line of Dewey Place with the East line of New Hampshire Avenue, and extending thence East in the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 350 feet, more or less, to the high

water line of the Atlantic Ocean as it existed on April 14, 182

1903; thence East at right angles to the high water line of the Atlantic Ocean as it existed in 1856, 770 feet, more or less, to said high water line as it then existed; thence Southwest along the high water line of the Atlantic Ocean as it existed in 1856 to point in said high water line where same would be intersected by the East line of New Hampshire Avenue extended; thence North in the East line of New Hampshire Avenue extended 1,120 feet, more or less, to beginning; a portion of the lands described in the deed from Chalkley S. Leeds to Robert B. Leeds aforesaid having been washed away by the ocean and partly regained by the gradual imperceptible increase therefrom.

And deed from Dewey Land Company to Samuel F. Nirdlinger dated February 4, 1914, recorded in the clerk's office of Atlantic County in Book 523, page 47, conveying an undivided one-half interest in the lands last above described.

BOURGEOIS & COULOMB,
Solicitors for Complainant.

We consent to the filing of within answer to counter-claim.

WILSON & CARR,
Solicitors of Defendant.

Order.

United States District Court for the District of New Jersey.

In Equity.

SAMUEL F. NIRDLINGER, Plaintiff,

vs.

HENRY E. STEVENS, JR., Defendant.

Order.

It appearing that since the argument of the above stated cause, to wit, on or about the 13th day of November, A. D. 1918, Samuel F. Nirdlinger departed this life testate, and that Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, by his last will and testament thereby became seized of the lands and premises of which the said Samuel F. Nirdlinger was seized at the time of his death;

It is, on this — day of —, A. D. 1920, Ordered that the said Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia be and hereby are substituted as parties plaintiffs for and in the place of Samuel F. Nirdlinger, deceased.

We consent to the making of the above order.

_____,
Attorneys for Defendant.

Order Amending Bill.

United States District Court for the District of New Jersey.

In Equity.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and REAL ESTATE TITLE Insurance and Trust Company of Philadelphia, Executors and Trustees under the Will of Samuel F. Nirdlinger, Deceased, Plaintiffs,

vs.

HENRY E. STEVENS, JR., Defendant.

Order Amending Bill.

It is, on the — day of —, A. D. 1920, Ordered that the description contained in paragraph 1 of plaintiffs' bill be amended to read as follows:

Beginning at a point in the Easterly line of New Hampshire Avenue, 240 feet Southwesterly from Pacific Avenue, said point be-

ing the Southeasterly corner of New Hampshire Avenue and Dewey
Place, thence extending Eastwardly, parallel with Park
85 Avenue and along the Southerly line of Dewey Place 100
feet; thence (2) Southwardly, parallel with New Hampshire
Avenue, to the present high water line of the Atlantic Ocean, to wit,
442 feet more or less; thence (3) Southwestly, along the present high
water line of the Atlantic Ocean to the Easterly line of New Hampshire
Avenue extended; thence (4) Northwardly, along said line of
New Hampshire Avenue to the place of beginning, to wit, 577 feet
more or less.

Judge

We consent to the making of the above amendment.

Attorneys of Defendant

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Testimony.

United States District Court, District of New Jersey.

In Equity.

SAMUEL F. NIEDLINGER, Plaintiff,
against

HENRY E. STEVENS, JR., Defendant.

Testimony.

Testimony Taken Before the Hon. Thomas G. Haight, at the Post
Office Building, in Trenton, N. J., in October 9, 1917.

Appearances:

Bourgeois and Coulomb and Hon. Robert H. McCarter, for the
plaintiff.

Harvey S. Carr, for the defendant.

Mr. Carr: The defendant admits the jurisdictional fact of diversity
of citizenship and peaceable possession of the complainant.

Mr. Bourgeois: Admits that we are in peaceable possession and
that no suit is pending?

87 Mr. Carr: Yes, except this suit of course; no other suits
pending.

Defendant's counsel offers in evidence the bill of complaint
amended bill, answer of Henry E. Stevens, Jr., answer of James V.
Northrup and replication, memorandum of Chancellor Walker, order
dismissing bill, notice of appeal and petition of appeal in the suit
instituted in the Court of Chancery in New Jersey wherein Dewey Lumber
Company, et al., was complainant and Henry E. Stevens and others

were defendants, and it is stipulated between counsel that the copies of the papers before mentioned, which appear in the printed State of the Case used in that cause in the Court of Errors and Appeals of New Jersey may be used in lieu of certified or other official copies.

(The book is received in evidence and marked Exhibit D1.)

(Defendant's counsel offers in evidence decree of affirmance and remittitur of the Court of Errors and Appeals of New Jersey in the case of the Dewey Land Company, et al., against Henry E. Stevens, Jr., said offer being in the form of a copy thereof annexed to the defendant's answer and admitted by consent.)

(Defendant's counsel offers in evidence the two opinions of the Court of Errors and Appeals to be found in 83 New Jersey Equity, 314 and 656.)

Mr. Carr: There is no dispute that the common title was in the Atlantic Beach Front Improvement Company, is there, Mr. Bourgeois?

Mr. Bourgeois: I think we will admit that.

88 Mr. Carr: That both the complainant and the defendant derived their title from the Atlantic Beach Front Improvement Company.

Mr. Bourgeois: The title to the upland.

Mr. Carr: Yes. The Atlantic Beach Front Improvement Company derived its title from John McClean by deed dated March 9, 1897, recorded on March 15, 1897, in Book 211 of Deeds at page 174. The Atlantic Beach Front Improvement Company by deed dated November 9, 1899, and recorded November 13, 1899, in Book 238 of Deeds 204 conveyed to William H. Burkard the premises therein described, the abstract of which conveyance, made by the West Jersey Title & Guarantee Company is by consent used in evidence and marked D2.

(Defendant's counsel offers in evidence a conveyance by the Atlantic Beach Front Improvement Company to William H. Burkard by deed dated November 9, 1899, recorded in Book 240 of Deeds at page 99, abstract of which conveyance is offered in evidence and received and marked Exhibit D3.)

(Defendant's counsel offers in evidence conveyance from William H. Burkard and Mary L., his wife, to William H. Bartlett and Elizabeth, his wife, dated November 9, 1899, recorded November 29, 1899, in Book 237 of Deeds, page 387 abstract of which conveyance is offered in evidence, received and marked Exhibit D4.)

(Defendant's counsel offers in evidence a certified copy of an application to the riparian commission made by William H. Bartlett and Elwood S. Bartlett by Thompson & Cole, attorneys, dated the 30th day of April, 1900, certified by Johnson C. Payne, formerly secretary and engineer of the riparian commission. Received and marked Exhibit D5.)

(Defendant's counsel offers in evidence certified copy of the deed from the State of New Jersey to William H. Bartlett and Elwood S.

Bartlett dated June 28, 1900, being a riparian grant and constituting a part of the locus in quo. Received and marked Exhibit D6.)

(Defendant's counsel offers in evidence original of the deed of conveyance made by William H. Bartlett, single and Elwood S. Bartlett and Ellen L., his wife, to Henry E. Stevens, Jr., dated April 25, 1905, recorded May 6, 1905 in Book 316 of Deeds at page 487 Atlantic County conveying the locus in quo with other lands. Received and marked Exhibit D7.)

JOHN P. ASHMEAD, called and sworn on behalf of the defendant testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Ashmead, you are a surveyor and engineer, are you not?

A. I am.

Q. And were you at one time a member of the firm of Ashmead & Hackney?

A. I was.

Q. Where did that firm do business?

90 A. Atlantic City, Atlantic County.

Q. How many years did they do business down there?

A. Twenty-five years I guess, twenty or twenty-five years.

Q. How long have you been an engineer?

A. About thirty-five years.

Q. And how long have you been familiar with the beach front conditions in Atlantic City?

A. About thirty-five years.

Q. I show you a blue print map marked map of premises situated in Atlantic City made October, 1917, by John P. Ashmead, civil engineer and I ask you whether you prepared this map?

A. I did the original of which this a blue print.

Q. Now does it correctly delineate the conditions of the street line in Atlantic City?

A. It does.

Q. And of the high water mark at various dates?

A. It does.

Q. And are those dates indicated on the map?

A. They are.

Q. And does it correctly show the lines of the riparian grants from the State of New Jersey to Bartlett, from the State of New Jersey to Henderson and from the State of New Jersey to McPherson?

A. It does.

The Witness (aside): That figure had better be changed on those other maps.

Q. Oh, yes. I call your attention to the lot of Jonah Wootton. I note that the last figure has been changed in lead pencil to 8, making it read 1858?

A. 1858 instead of 1854.

Q. And all copies corrected accordingly?

A. Yes.

91 Q. Now does this show the line established by the riparian commissioners?

A. It does.

Q. Can you point out to his Honor the tract of land embraced in the deed from *the* Bartlett to Stevens, Exhibit D7? Suppose as I read the description you follow it for the Court's information. "Beginning in the westerly line of New Hampshire Ave. 250 feet southward from the southerly line of Pacific." Will you indicate for his Honor the position of that point?

(Witness indicates.)

Q. (Continuing:) "Thence westerly parallel with Pacific Ave. 160 feet; thence northerly and parallel with New Hampshire Ave. 190 feet; thence westerly parallel with Pacific Ave. 15 feet; thence southerly parallel with New Hampshire and Vermont Avenues 250 feet to the northerly line of Oriental Avenue; thence continuing same course parallel with said New Hampshire and Vermont Avenue and crossing Oriental Avenue at high water line to the exterior line of the Riparian Commissioners; thence along the said exterior line curving to the left with a radius of four thousand six hundred and seventy feet more or less to the easterly line of a grant made by the State of New Jersey by the Government and Riparian Commissioners to William H. Bartlett and Elwood S. Bartlett."

Mr. McCarter: That seems to be 494 by this map.

A. I don't understand where the six hundred and some feet is that you read there.

92 The Court: Then this 494 should be 670, shouldn't it?

Mr. Carr: No, 494 is along the exterior line.

The Court: Now where does the 670 come in?

The Witness: 670 more or less it says, but it is a mistake.

The Court: 494; well then at any rate the property covered by the deed from Bartlett to Stevens is this property which you have just delineated on the map and which I will mark A, is that right?

The Witness: Yes, sir.

The Court: Have you offered this map in evidence?

Mr. Carr: Yes, I offer the map.

(Received and marked Exhibit D8.)

The Court: Now I have marked the property which the witness has just shown as embraced within the description of the deed as A.

Q. Now Mr. Ashmead, are you familiar with the Atlantic City dedication map?

A. I am.

Q. The blue print map which I now show and which is marked "Map of Absecon Beach bounding on Atlantic Ocean, Survey No-

venber 1852 by J. L. Rowand, Surveyor." Is that a copy of the Atlantic dedication map?

93 A. That is a true copy.

Q. Made by you?

A. It was partly made by me, and part by my assistant, that is the tracing was traced by myself and one of my assistants—

Mr. Carr: I offer the map.

A. (Continuing:) From the map on file in the county clerk's office, Atlantic County.

The Court: That is, the original is?

The Witness: Yes.

The Court: You did not make the map in the first instance?

The Witness: No, Rowand made the map.

Mr. Carr: We both want it to go in.

(Map received and marked Exhibit D9.)

Q. Mr. Ashmead, the irregular lines at the south of the map will you say how they are described on the map itself?

A. The line along the beach is intended to represent low water.

Q. So that the line to which I am now pointing is intended to represent the low water mark?

A. Low water mark as surveyed in 1852.

The Court: The line to which Mr. Carter points is a number of irregular lines at the top of the map.

Q. I call your attention to the word strand appearing
94 upon the map and covering portions of blocks 95, 96, 97, 98 and also the same word covering a portion of blocks 119 and 120 and I ask you what that space represents?

A. That space represents the land between the line marked on this map, line of the outside sand hills and the line representing the low water mark.

Q. What does the word strand mean?

A. It means the line between high and low water I should take it.

Q. Now the line of the outside sand hills coupled with the use of the word strand, does that indicate to you—

(Objected to.)

Q. (Continuing:) What the map is intended to represent in the way of a high water mark?

A. Yes, I think the high water mark is the line of the outside sand hills or very near it, and of course the low water line is represented by this mark and the word strand is between these two lines.

Q. That is the space between the low and the high water mark?

A. That's what I should say it was as represented on that map.

Mr. McCarter: May I ascertain where he puts the low water mark on that?

The Court: It is marked there Mr. McCarter, the words themselves are on there. Now then he says the line marked line of the outside sand hills in the high water mark and that therefore the intervening space which is marked strand, seems to be all the way up the map, indicates the line lying between high and low water mark.

95 Q. Now M. Ashmead, on the map Exhibit D8, did you indicate in any way the position of the line of the outside sand hills shown on the Rowand map Exhibit D9?

A. I did. It is the dash line and marked line of the outside sand hills as shown on Rowand map 1852.

The Court: The Rowand map is D9?

The Witness: Yes, that's this one.

Recess.

Afternoon Session.

Mr. ASHMEAD resumed.

Direct examination.

Continued by Mr. Carr:

Mr. Carr: If the Court please I offer in evidence copy of a map made by The United States Coast and Geodetic Survey, surveyed in 1863 and 1864 for the purpose of showing the ocean front at Atlantic City at that time.

Mr. Bourgeois: That is objected to because of improper proof, in other words that does not prove itself. In another case in which I was interested I had occasion to examine the geodetic people with regard to the making of those maps. You will notice the scale is 10,000 feet to the inch.

The Witness: No, that is not what that means, it is 833 feet to the inch.

96 Mr. Bourgeois: It developed in that case you could not tell anything about the map, that actual measurements showed that the width of a line would mean many, many feet and the shrinkage of paper and all those things entered into the distances. Having that in mind I object to it.

Mr. Carr: That will only go to the force and effect and credit to be given to the map itself. It is made by governmental agency and under the cases the Court will take judicial notice of it as a record prepared by an administrative bureau or agency of the government. It undoubtedly is far more accurate than the recollection of witnesses. Even traditionary evidence is received in the case of ancient boundaries. The great difficulty of course is to find living witnesses who can testify as to conditions that far back, for that reason the Court permits even traditionary evidence to go in, which of course is hearsay evidence. It also permits the Court to take judicial maps prepared by governmental agencies and this is such

a map. The only thing required of a Court to take judicial notice is to satisfy itself of the authenticity of the paper submitted.

The Court: I think I will accept the map subject to objection and pass upon its force and effect hereafter, provided there is no objection to a photographic copy, as it purports to be.

Mr. Bourgeois: We don't know where that comes from at all. It is simply a photograph of something, it may be a photographic copy.

Mr. Carr: It was furnished to us by The United States Geodetic Survey as a copy of the official map on their files.

If the Court please if objection is made to the lack of certification I will furnish certificates. I do not think it is necessary because under the cases the Courts take judicial notice of official maps if the Court itself is satisfied that it came from the proper agency, as we take judicial notice of laws of other states.

The Court: The point is there ought to be more proof identifying it and showing exactly what it is and so forth. It amounts to nothing Mr. Carr, without explanation, merely this witness' interpretation of a map made by someone else, if he attempts to interpret it.

Mr. Carr: I am not asking him to interpret it because the map seems to interpret itself except as his skill as a surveyor enables him to make more clear what is not clear, at least to me. The maps were furnished to me at my request by this bureau of the government. I would like to offer them and have the Court receive them subject to later certification, such certification as is necessary, I really think it is helpful to the Court.

The Court: I think you ought to produce the best evidence that you can from the archives at Washington as to how they were made and so forth so that we can in some way determine whether or not they are of any weight and whether they should be given any weight in this controversy between two private individuals. Now I have no doubt that the field books or notes made by an officer of the government in the discharge of his duties would prove themselves by simply proving that they were made by a man who

was the official surveyor or what not, and those notes in connection with the map might make them a very substantial and important piece of evidence. But the maps standing by themselves without anything else to explain them do not seem to me to carry any force or effect whatever. Why not let the map be admitted for the purpose of letting Mr.—no, the map need not necessarily be admitted, he can testify that the marks that he has made on this Exhibit D8 was the line which he took on such and such a map and that explains this particular line and then to have that map of any probative force it would have to be in some way substantially explained, probably explained rather than substantiated, because it may be as Mr. Bourgeois says that this map was made in such a way that it would be of no probative force, that it was merely for the purpose of soundings, or something or another of that kind, and if I admit the map it does not seem to me it would have any weight at all.

Mr. Carr: I would like to make the offer of the maps if your Honor will receive them pending further argument.

The Court: You may make the offer of the maps, but I think before they can be given any weight you will have to have them explained in some proper way. It might be that the explanation will be found right in the law as to the purposes for which they were made and everything of that kind, but it is going to be a very difficult matter to search that out of the law and find it, and I think the far better procedure would be to bring somebody from Washington here and let him explain them, bring the field notes at the same time and then we can determine exactly what weight is to be given to them irrespective of the question of competency.

Mr. Carr: Well I make the offer now. I will ask that they at least be marked for identification.

(Maps marked Exhibit D10 for identification.)

Mr. Carr: I also offer in evidence United States Geodetic Survey Maps made in 1869 and 1870 showing the beach front at Atlantic City.

Mr. Bourgeois: That is objected to for the same reason.

The Court: Same disposition as before.

Mr. Carr: I understand your Honor does not rule them out at this time, they are held subject to further proof of authentication.

The Court: I receive them at this time merely so the witness now on the stand can testify regarding some data on his map which is taken from those maps, but will not admit them for any other purpose at the present time, at least until there is further proof showing the circumstances under which they were made, and so forth.

(Map marked Exhibit D11 for identification.)

Q. I show you Exhibit D10 for identification, being a geodetic survey map and ask you whether or not you indicated any of the lines from that map on Exhibit D8?

A. I did.

100 Q. What line did you indicate on Exhibit D8 taken from Exhibit D10 for identification?

A. "High water line 1863-1864 U. S. Coast & Geodetic Survey."

Q. Did you find a high water mark on the geodetic survey map, Exhibit D10 for identification?

A. I did.

Q. And did you delineate it in its correct position upon Exhibit D8?

A. I did.

The Court: What did you take in D10 as the high water mark, what line?

The Witness: Solid line inside of the dotted line as shown upon this map.

The Court: The dotted line?

The Witness: The dotted line is the low water line.

The Court: The extreme low water line and the solid line is what you consider high water line?

The Witness: The solid line is what I consider to be the high water line and the dash line is the outside row of sand hills.

Q. Now will you kindly look at Exhibit D11 for identification and state whether or not you portrayed any line thereon, on Exhibit D8?

A. I did.

Q. What line did you indicate on——

A. "High water line 1869-1870 Coast & Geo. Sur."

Q. Now will you state how far the high water line as indicated on the geodetic map, the high water line of 1863 and '64
101 south of Pacific Avenue along the line of New Hampshire Avenue?

A. About 50 feet, 45 feet.

The Court: 45 feet at its narrowest?

The Witness: Along the west line of New Hampshire Avenue.

Q. Now will you also state how far south of Pacific Avenue along the west line of New Hampshire Avenue the line of outside sand hills is distant from Pacific Avenue?

A. 280 feet.

Q. And do you fix that as the high water mark of 1852, as you interpret the Rowand map?

A. I do.

Q. Do you know whether the grant made by the state to Bartlett evidenced by Exhibit D6 joined the land of Bartlett as shown on your blue print map?

A. It did, went up to the high water line May 1900.

Q. That's all. Cross-examine.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Ashmead, is any part of the land covered by the riparian grant to Bartlett narrow, high fast land?

A. It is.

Q. How far down can you indicate on that map where the high water line is at the present time?

A. I can, if you will let me have the map I made for you.

102 Mr. Carr: Now at this point does he become your witness?

Mr. Bourgeois: No, I am cross-examining him as to your map only he wants to borrow the map he made for me.

A. Now, on the east line of New Hampshire, will that do?

Q. Yes, or west line either, I don't care which. Maybe we had better have the west line.

A. West line would be about thirty or forty feet. On the east line it is 880 feet.

The Court: On the west line of New Hampshire?

The Witness: On the east line.

Q. West line I want from wherever the grant commenced.

A. 250 feet.

Q. I want to know how far from that point—I want you to locate on this map the high water line, I don't care whether you go from Pacific Avenue or where you begin.

(Witness indicates.)

The Court: It is the point where you have marked the X and which we will call "B, high water line October 6, 1917."

Q. Now measure and indicate on the map about where the high water line is distant from the intersection of the easterly boundary of the Bartlett grant to the intersection of the westerly line of New Hampshire Avenue.

108 (Witness indicates.)

Q. Now the high water line between those two points is practically straight, isn't it?

A. Yes.

Q. Won't you draw a line connecting the two by your rule there?

The Court: The witness indicates by a line placed on the map marked "C."

Q. Then that portion of the riparian grant enclosed by the triangle, having for its westerly boundary the westerly side of New Hampshire Avenue for its southerly boundary the high water mark, and for its easterly boundary the last course, I think it is in the Bartlett grant, running from the exterior line up to the intersection of New Hampshire Avenue, is now high fast land?

A. Yes, that's high land, it is all above high water, ordinary high water.

Q. And it has been how many years in accumulating, when was this grant made?

A. 1900 I think.

Q. You made the survey 1900 and what?

A. 1917.

Q. And in those seventeen years that beach is made up there that far?

A. Yes.

The Court: That is that whole triangle of hard, fast upland had been made in the last seventeen years?

The Witness: Yes.

104 The Court: Let me ask you one question. You have indicated on this map high water line at different dates. In addition to this, you have already testified about the high water mark 1863, the high water mark 1869 and the high water mark 1852. Where did you get the information on which you made these statements on the map?

The Witness: Got them from a map of survey that I made according to the dates shown on that map.

The Court: And these correctly set forth the high water mark the time specified thereon?

The Witness: It does.

Mr. Bourgeois: Except only as the geodetic survey and this demarcation line.

The Witness: Except those three.

The Court: And all the others?

The Witness: All the others I made the surveys myself.

The Court: Passed on your personal knowledge?

The Witness: Yes, sir.

Q. Now, Mr. Ashmead, will you go to the other side of the Judge's map, please, and let me ask you a question about the other map. You see some diagonal lines running in a southeasterly direction on the Atlantic City dedication map, D9, extending from, well some of them far up as Adriatic Avenue, almost to the ocean?

105 A. Yes, sir.

Q. What do these lines indicate?

A. Those represent the division of the estate of Jeremiah Leeds; there may be some others there.

— There are some others, aren't there?

A. I think so.

Q. Neely, Leeds, Dowdy and Pitney, McManus.

A. It has been divided up.

Q. In other words those are the—

A. The original lines of the Jeremiah Leeds division.

Q. Now did you ever see the original map from which the map in the clerk's office was made, to know whether or not the street system is on it?

A. See the original map?

Q. That's the one in the clerk's office?

A. The one this was taken from.

Q. Did you ever see the one made before that, the one made by Rowand?

A. This is the one made by Rowand.

Q. I understood that Rowand made the map and Osborne put the street system on.

A. I could not say as to that, it is signed Rowand, same as on the map, it says it is made by Rowand, that's all I know about it.

Q. What I had in mind was this. I wanted to ascertain if they were the property lines and if they corresponded or did not correspond with the street system, that is as to direction. I understood you to say they are the property lines.

A. They are the property lines.

Q. They do not correspond as to direction with the street?

A. They don't run the same direction as the streets, no, but the street system of course, I don't know when it was laid out, but this map was made, it says, in—

106 Q. 1852.

A. Shows when it was made by Rowand there.

Q. When was it made, 1852?

A. 1852.

Q. And filed in 1854?

A. No, it was filed in '84 I think.

Q. '54?

A. No, I think it was '84 or '81.

The Court (reads): "Received May 23, 1854, recorded in clerk's
office of Atlantic County. Filed in clerk's office Atlantic County,
October 24, 1882."

Q. Now, Mr. Ashmead, I understood you to testify that the inner
line at the point of the beach was the water line of the sand hills, is
that correct?

A. The inner line?

Q. Yes; first was the edge of the water the low water mark?

The Court: What he testified to was the low water mark, the out-
side of the sand hills was the high water mark.

Q. That's what I wanted to ask him.

A. Of course, there is another line there.

Q. No, the one marked "Outside of sand hills," why do you say
that was the line of the high water mark?

A. Because at that time, at that place the high water line must
have been the outside row of sand hills, because the beach was wash-
ing away.

Q. Why do you say it must have?

A. Because it is always the case when the beach is washing away.

Q. Have you any knowledge that the beach was washing away in
1852?

A. Yes.

Q. What knowledge have you?

A. These different surveys.

Q. They are made afterwards, they are made 1869? In 1869-

71. Now what leads you to believe that the ocean was making in
1852?

A. Because afterwards it was very many feet, that is several hun-
dred feet further in.

Q. I know, but that does not indicate it was making in then, it
may have been making out at that time. Our beaches do wash in
and out, don't they?

A. Another reason there was about the same distance shown on
the map as you find between the high and low water marks.

Q. Now don't you notice Mr. Ashmead that the distance between
the sand hills and the low water mark at the point I have indicated
is about seven or eight times as great as the low water mark and the
sand hills on the other parts of the map?

A. That's very true. It is marked strand too, at that point.

Q. Do you know what was there?

A. Nothing only what I find on the map.

Q. What you have said is just your deduction from the map?

A. Well, that's true.

Q. For all you know the high water mark may have been an ordinary distance from the low water mark at that point?

A. Not according to that map.

Q. What is the range of the tide in front of Atlantic City?

A. That is the rise and fall?

Q. No, I don't mean the rise and fall but on the beach, how many feet about between high and low water?

108 A. Two to three hundred feet. It varies in different places.

Q. And that is practically uniform, is it not?

A. It is with the exception of course it varies the same as it does in that particular case.

Q. Now do you know if in this particular case there was a stretch of just beach, sand, running from these sand hills out at the point before you come to the high water mark?

A. Not to my knowledge, my actual knowledge, no.

Q. And you don't know to the contrary from your actual knowledge either, do you?

A. I don't know anything about it except what I find on the map.

Q. And that is the first map made of that locality of which you have any knowledge, isn't it, that is in Atlantic City, having knowledge or any record.

A. Except the division of Jeremiah Leeds estate.

Q. That only goes across, that don't show the shore line?

A. I think it does.

Q. Below the shore line?

A. I think so.

Q. When was that made?

A. Along about the same time that this was made, a little bit before.

Q. Well it was finished I think about the same time, about 1852.

A. No, the division was made before that.

Q. Have you a copy of that to show the surf line?

A. Down at the office yes, but I have not looked at it recently.

Q. Now Mr. Ashmead, may I show you another map that you have made for the purpose of asking you to give me a distance?

109 That is a map I think from which you made map D8, I presume that this is based on that one?

A. No.

Q. Now I ask you to look at the map made by you in 1912 showing the low water mark in 1852 and then by reference to the map D8 tell me what is the distance from low water mark to high water mark as you have indicated on D8 of 1852?

A. How much outside of the riparian commissioners' line?

Q. Yes.

A. The farthest point out is about 420 feet.

Q. Oh, you have made a mistake there.

A. That is east of the riparian commissioners' line?

Q. Yes. Now I want you to measure from the riparian commissioners' line?

Commissioners' line to the high water mark of 1852 as you have indicated on D8. How far is 420 added to this distance here?

The Court: What was that?

Mr. Bourgeois: 420 from the riparian line to the low water mark.

A. 1,190 feet.

Q. 1,190?

The Court: What do you mean by the expression "on D8 of the riparian commissioners' exterior radiants?"

The Witness: The line that they fix for the exterior of all the surveys. They fix a line there and then run out to that line.

110 The Court: That line was inside of the low water mark?

The Witness: No, it was away outside, it was 2,000 feet.

Q. Which was that Mr. Ashmead?

A. The riparian line.

Q. Now—

A. Well, that's never changed, the line the riparian commissioners fixed has always been the same.

Q. But that was inside of the original low water mark of 1852?

A. Oh, yes.

The Court: That was inside?

The Witness: There is the low water mark of 1852, and this is the riparian commissioners' exterior line.

Mr. Bourgeois: May I see those two geodetic maps? Is it all right for me to cross-examine on them?

The Court: Yes, you will have to cross-examine, so far as the witness' direct examination went it was very limited you know, he has only indicated what he considers the high and low water marks on those maps.

Mr. Bourgeois: I want to find out just how he was able to locate it.

Q. How were you able to locate on your map the high water mark from these two maps?

111 Mr. McCarter: So-called geodetic maps?

A. Scaled it from the street system out to the high water mark, from the southerly line of Pacific Avenue out to the high water mark.

Q. And the scale of this geodetic map D11 is what? 2,000 feet to the inch?

A. No, one foot equals 20,000 feet—one foot on the map equals 20,000 feet on the ground. That's the scale; divide that into twelve and you get 1,666 feet to the inch.

The Court: What do you mean by that, I don't understand you?

Mr. Bourgeois: One foot on the map equals 20,000 feet on the ground. Now if one foot on the map equals that then an inch would be one-twelfth of that.

The Court: Oh, an inch, I see.

Q. Now the width of this high water line that's indicated on a map—I suppose the high water mark on the beach has no width but in this map it is what part of an inch?

A. I could not scale the width of a line, it is too narrow.

Q. Is it as little as one 64th of an inch?

A. I suppose it is.

Q. How many feet would that make on that scale of 2,000 feet to the inch?

A. It wouldn't amount to anything, that is it is not 2,000 feet.

Q. Well, 2,000 feet to the foot you said?

A. No, I didn't say anything about it, I said 1,666 feet to the inch.

112 Q. I didn't ask you that, I said 2,000 feet to the foot—
one foot on this map equals two thousand feet on the ground.

The Court: 20,000 feet on the ground.

Q. Now then I want to know if this is one 64th of an inch 1,666, would be about 26 feet, the width of that line, wouldn't it?

A. No.

Q. Well isn't 64 contained into 1,666 that many times?

A. It is so small you could not scale it at all.

Q. It would be 26 feet and a fraction—well, that's what I am driving at. This is so small you cannot scale it and when you attempt to reduce it to feet it becomes very uncertain?

A. There is 400 feet in one of these blocks.

Q. Yes, just to show you how uncertain it is, look at the avenue just to the right or eastward of the lighthouse.

A. You don't have to scale that at all because it crosses right at the intersection of that avenue, not necessary to scale that.

Q. Don't you see Mr. Ashmead that it passes just beyond the easterly side of the street, there is a street, there is a street; you have drawn a line down from the street above Atlantic Avenue for the purpose of extending it, but on this map the line passes to the eastward?

A. No, it runs about the intersection of the street.

Mr. Bourgeois: Now I want the Court to see. I say the line passes to the eastward of that—there is the street intersection—the line is entirely to the eastward.

113 The Court: What do you mean?

Mr. Bourgeois: This line.

The Court: Which is the high water line.

Mr. Bourgeois: Yes, is to the eastward of that street intersection.

The Court: Now, what do you say about that, Mr. Ashmead?

The Witness: I say that is not so what he says. He doesn't extend the southerly line of Pacific Avenue at all. If he extends it out to the easterly line of—

The Court: You ought to know more about it than he does, so you will take your version.

Q. Well, Mr. Ashmead, isn't it a fact you cannot do accurate work on a map with so small a scale as this?

- A. You can get it within a few feet, you cannot get it right down the foot, but it won't be many feet out of the way.
- Q. The width of the line is 26 feet anyway, isn't it?
- A. No, from six inches to a couple of feet perhaps.
- Q. Well now listen: 20,000 feet to the foot is 1,666 feet to the inch. Now do you think that is a less—is that line less than 1/64th an inch?
- A. Yes, I think it is.
- Q. Well how much do you think it is?
- A. It isn't necessary to scale it at all because it shows exactly where it crosses that intersection.
- Q. I have something else on my mind, is it as much as 1/100th of an inch?
- A. I don't know, I haven't scaled it, I cannot scale a line, I can scale between two lines, but when it comes to scaling a line I cannot.
- Q. Have you any instrument that can scale that line and tell you what part of an inch it is?
- A. Well you can get pretty close to it I suppose, we have never tried to scale the width of a line.

Redirect examination.

By Mr. Carr:

- Q. Mr. Ashmead, are you satisfied that the lines shown from the geodetic survey map, shown on Exhibit D8 are shown with accuracy?
- A. They are.

Mr. McCarter: Well I object to that your Honor, I don't suppose whether the witness is satisfied or not——

The Court: This is merely a summing up.

- Q. I will strike out "satisfied," is the line shown with accuracy?
- A. It is.

Q. Can you tell me how the exterior riparian line is established Atlantic City?

Mr. Bourgeois: We object to that, he does not know.

Mr. Carr: I asked him whether he can tell.

Mr. Bourgeois: It must be hearsay.

Mr. Carr: He may know.

A. All I know is by the maps put out by the riparian commission.

Q. Do you know how the exterior line runs, where it is located?

A. Yes, 2,000 feet south of the southerly line of Pacific Avenue at is the tangent. Then it curves around with a radius of 4,000 feet.

Q. Do you know how long that line has been established?

A. No, I don't know just when it was established. A good many years.

Q. How long have you known it to be in existence?

A. I think at least twenty-five years, perhaps longer.

Q. And do you know whether it has been adhered to in making of riparian grants?

(Objected to as immaterial.)

A. It has.

The Court: I will take it.

Q. That's all.

Recross-examination.

By Mr. Bourgeois:

Q. Mr. Ashmead, what was the beginning and end of the tangent?

A. The tangent is simply the street line.

Q. I know, but it had a beginning point and an ending point that circle?

116 A. In that case began down the beach and ran up to somewhere, where the beach began to curve to the northward, then it curves to the northward with a radius of 4,000 feet, I don't just remember the point it began now, what street.

Q. Where it ended.

A. No, I don't know just where it ended. Of course it was shown on the riparian commissioners' map.

Q. All you know is it had a radius of 4,000 feet?

A. Yes.

Mr. Carr: If the Court please I have a couple of very old gentlemen here as witnesses and counsel have consented that I may put them on out of order.

The Court: All right.

HARRY E. YATES, called and sworn on behalf of the defendant testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Yates, where do you live?

A. Atlantic City, N. J.

Q. And what is your occupation?

A. I am in the police department at the present time.

Q. How old are you Mr. Yates?

A. 43.

Q. Do you know the section of the beach around New Hampshire Avenue?

117 A. Very well.

Q. Were you ever in the boating business?

A. Yes, sir.

Q. What were you doing in that business?

A. I was in the Government Service, life saving service twelve years, and smack fishing business about 17 years.

Q. How long since you first knew the beach in the neighborhood of New Hampshire Avenue?

A. From boyhood.

Q. Do you recall its condition when you were a boy?

A. Yes, sir.

Q. What was the situation then with regard to high water mark?

A. Well, very small line. I used quite often to go to the life saving station there near Vermont and Pacific and there was a slough, what we called a slough, that's a depression in the beach which fills with water. On the outside there is a reach of sand and sometimes the tide does not come over that reach, other times it does. And I remember distinctly that I could stand at Vermont Avenue near Pacific and throw a stone in the water.

Q. Where was the life saving station?

A. Vermont Avenue near Pacific, about 200 feet from Vermont and Pacific.

Q. That is north of Pacific?

A. Yes.

Q. And is the lighthouse in the same block?

A. Yes, sir.

Q. You say the high water line crossed Vermont Avenue about where, with regard to Pacific Avenue?

A. Well, it crossed down below between Pacific and Oriental, it is now Oriental Avenue. Wasn't there at that time, I don't know how far.

118 Q. Oriental Avenue by the map appears to be 400 feet south of Pacific Avenue.

A. Yes.

Q. You say it crossed at a point between Pacific and Oriental Avenues?

A. Yes, sir, near Pacific.

Q. Do you know where it crossed New Hampshire Avenue?

A. I should judge up towards the inner side of the Royal Palace, now where the Royal Palace Hotel is. There was no street there in those days, it was all beach.

Q. There were no streets laid out?

A. Not on the east side of Pacific. Pacific Avenue ended at Vermont.

Q. There were no laid out streets there?

A. No, sir.

Q. What about the streets running north and south like Vermont and New Hampshire?

A. They ran to the beach and the curve of the inlet.

Q. Were they graded streets?

A. Gravel, yes, they were graded if you call it graded.

Q. Now did the high water mark come above or below Pacific Avenue at New Hampshire Avenue when you first knew the beach?

A. There was a gradual curve. What's this, Maine.

Q. That's Maine. The lighthouse would be up here, the saving station would be in there somewhere.

A. The Boardwalk would come right along here.

The Court: Now then, indicate on this map D8, now draw a line where you say the Boardwalk runs.

119 The Witness: Inside the high water mark there.

The Court: Well, where was the high water mark?

The Witness: Right along this line of marks here. This is Pacific Avenue, used to drive right up here, the Boardwalk, go right across the street. This was not graded in my boyhood days.

The Court: So you say the high water mark when you were a boy is where it is marked high water mark 1869-70?

The Witness: Yes, sir.

Q. Would that high water line be north or south of Pacific?

A. North.

Q. And about how far north of Pacific would you place it?

A. I could not say the distance.

Q. Can you say what portion of a block, whether one-quarter or half or a whole block?

A. I should judge about three-quarters of a block, according to this map, to the best of my recollection. You know I was a boy at those things did not impress my mind very deeply at that time. There has been a gradual making of land since I have been a boy outward. Now of course we would have northeast storms, this would wash away, but gradually make up again, but the tendency has been as long as I can remember to make out.

Q. And your memory goes back how far?

A. I was born in 1874.

The Court: Well it does not go back to 1874.

120 The Witness: No, no, I say I was born in 1874.

Q. How far does your memory go back, about 1880?

A. Yes.

Q. Do you think you can remember conditions when you were six

A. 1881. I was seven year-old when I first started to knock around there.

Mr. McCarter: There was a distinction in your mind between high and low water mark at seven do you say?

The Witness: Yes, I used to wait until the tide got up to go on the beach to catch fish, and I caught fish when I was pretty small.

Q. Then in your recollection has the high water mark ever been out further than it is at the present time?

A. No, the high water mark is as far out as I remember it, now.

Q. Thirty-five years or so that you have the recollection of the beach has it been making inward or outward, has the beach been making inward or outward?

A. There were times when it cut away quite frequently. We had a bad northeast storm there, it cuts away, it will invariably do that but it always had a tendency to make out a little further after each storm, when it started to build, it built farther than the previous beach was, you know what I mean.

Q. Do you know what the tendency of the movement of the sand is along the beach?

A. The tendency of all the inlets I remember, I have been at quite a few inlets on the Jersey Coast, the tendency has been on the north point to make up and the south point to cut away.

Q. That is the movement of the sand?

A. The north beaches would cut away and deposit the sand on the south side of the inlet.

Q. That is the movement of the sand has been southward on the coast?

A. These northeast storms cuts sand loose you know and seems to throw it on the other side. There is always a strong current with a northeast wind which we don't have with any other wind and these sands will make up afterward.

The Court: On the south side of the point?

The Witness: On the south side of an inlet which would be the north point of the beach, that's made up.

Q. That is the movement of the sand is southward, is that the idea?

A. Yes, sir.

Q. It is a general trend?

A. Yes, sir, our inlet at Atlantic City today is a mile across. Of course there are sand-bars. When I was a lad a man could go down and holler across the inlet, you could understand what he wanted, "Come get me a boat," something like that.

Q. Do you know how long that southward trend of sand movement has been going on?

A. All my life as far as I can remember.

Q. Do you remember the channel of the inlet, where it was with relation to Pacific Avenue?

A. The inlet follows the making of the beach very close. It is a very steep beach there, goes down all the way around the point from the inlet down to Pacific Avenue, very steep beach.

Q. How near in would the boats come, how close in would they come?

A. Within fifteen or twenty feet of the sand.

Q. And how close?

A. On the low water that is.

Q. Yes, and how close would they be to Pacific Avenue?

A. At the present time?

Q. Yes, as Pacific Avenue is laid out now.

A. Well, New Hampshire Avenue is a square from Pacific, two blocks now, over two blocks from Pacific to where the vessels sail now.

Q. No, I mean at that time, when they sailed in close, how close would they come to the lighthouse; maybe that will fix it.

A. You mean in time back?

Q. Yes.

A. I have sailed on vessels where there are houses now, and lots of houses; The Royal Palace is on land that was under water at one time that I can remember, that is a big hotel.

Q. Yes; how close would vessels sail to the Government Life Saving Station there when you were a boy?

A. Well, I should say 200 feet, 250.

Q. Within 200 or 250 feet, and the life saving station faces Vermont Avenue, does it?

A. Yes, sir.

Q. And is how far above Pacific?

A. A couple of hundred feet, about two hundred.

Q. About two hundred feet north of Pacific?

A. Yes, sir.

123 Cross-examination.

By Mr. Bourgeois:

Q. Now, Mr. Yates, you were born in '74?

A. Yes, sir.

Q. When did you begin to follow the water?

A. I began to follow the water as soon as I could get in a boat.

Q. And where was your home?

A. 15 South Virginia I was born.

Q. You remember I suppose, many of the hard storms that they had down there?

A. All of them, nearly all.

Q. And they would cut in how far at a time?

A. Well, sometimes they would cut in farther than others.

Q. Yes, sometimes as much as 100 feet?

A. Oh, yes.

Q. Sometimes more than 100 feet?

A. Sometimes more.

Q. Then it would take how long before that would be made out again?

A. I have seen a northeast storm cut away so that it would take three or four years before it ever got back to the starting point. Then it would gradually keep on going out. That's what I have been saying. You know that these storms have been cutting the beach away and alternately would fill up, but it has always been made out from my boyhood days.

Q. That is from '69, some place there, that's before you were born of course?

A. Oh, yes.

Q. But the storm would cut it away, then when the storm would subside gradually it grows, or maybe another storm would cut it out so far, but gradually it made out?

124 A. Yes, sir.

Q. Now along in about '81 do you remember that there was a peninsula off the point of the beach there that came down almost in front of Rhodes Baths and later then—you know where Rhodes Baths are, New Jersey?

A. They were not there then.

Q. But I mean Rhodes Baths at New Jersey Avenue, where they are now.

A. Yes.

Q. You remember there was a peninsula made there and came down?

A. That's what we call the slough. There was a slough started in the neighborhood of New Jersey, ran to Massachusetts. Then there was another one below that started between Massachusetts and Rhode Island and ran down by the lighthouse.

Q. And that slough up farthest, Massachusetts, that filled up the upper end of the inlet, didn't it?

A. Yes, sir.

Q. And made something like this—here is high water line, then comes back there, then comes back again, made a slough that you speak of?

A. Yes.

Q. Then after a while that filled in?

A. Yes, sir.

Q. That made a lot of land when that filled in?

A. Oh, yes.

Q. Now, do you remember about 1897, when that had filled in they had a large sale, I mean an extensive sale of lots there, the Eldridge Estate?

A. I don't remember the sale of the lots, I remember the slough, I remember of the slough filling in and I remember the making, but I don't remember any sale.

Q. How much would this beach make up a year, I mean
125 how much would the accretion amount to in a year, could you tell?

A. There was no way of telling that Mr. Bourgeois.

Q. You could not tell from time to time?

A. No, you couldn't tell, there was some—I know it made up.

(Map marked Exhibit P1 for identification.)

Q. You talk about the streets being graded; which streets did you have reference to when you said they were graded?

A. Vermont Avenue was graded down to nearly the point of Pacific. Pacific Avenue was graded up nearly to the point of turning—oh, no, I am wrong, from Rhode Island to Vermont on Pacific was not graded, it was just soft beach sand, they used to drive on that, and get around to Vermont on here.

Q. Curbed, was it?

A. Wooden curb and gravel on the south side of Vermont Avenue or on the northeast side of Vermont Avenue towards the ocean. That was not graded only on the side towards the Government property.

Q. Do you recall when the curbing was first put in here, south of Pacific, wooden curbing?

A. No, I don't recall it being put in, I remember about the time it was put in they had these streets graded to the beach you know, within a short distance, and as the beach made out—of course they

extended the streets, kept building houses out and they would

Q. Extended the curbs; but tell me as nearly as you can, when they curbed New Hampshire Avenue south of Pacific many years ago has it been?

126 A. South of Pacific?

Q. Yes.

A. I could not tell you accurately, I don't believe I could you within five years, and I would rather not answer that because it would not be accurate.

Q. Mere guess?

A. Yes, mere guess, I remember that, but I have not got dates in my mind.

Q. I think that's all Mr. Yates.

EZRA A. SOMERS, called and sworn on behalf of the defendant testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Somers, where do you live?

A. Atlantic City.

Q. And how old are you Mr. Somers?

A. Well, I am about seventy, close to it, sixty-nine or seventy.

Q. How long have you been living at Atlantic City?

A. Well, I lived there about thirty-six years steady.

Q. When did you first come to Atlantic City?

A. '66 I think along there, shortly after the war broke up.

Q. Where did you board?

A. Now?

Q. No, then?

A. Why I boarded at Mrs. Nixon's.

Q. Where was that?

127 A. Top of the lighthouse; first went there a couple of years.

Q. Right there at the lighthouse?

A. Yes, sir.

Q. Do you know where the high water mark was?

A. No, sir.

Q. When you first went down there?

A. Never took no notice of it, don't know a thing about it.

Q. Do you know whether it was above or below Pacific Avenue?

A. No, I couldn't tell you anything of the kind.

Q. You don't know anything about it at all?

A. No, sir, I do not, all I know I seen the tide come up to the lighthouse step once and I heard his wife, Mrs. Nixon, say to the other man—

Mr. Bourgeois: No, no.

The Court: You heard Mrs. Nixon say what?

The Witness: Tell him to look out for the door step, that's only one time I ever saw that. She thought it would wash away.

Q. The tide came right up to the lighthouse, that was a storm tide?

A. Yes, it was a good one.

Q. You can not tell us then where the high water mark was?

A. No, I don't know anything about it, never took no interest in it.

Q. Well, I think that's all Mr. Somers.

128 Cross-examination.

By Mr. Bourgeois:

Q. Sometimes the storms were so high they washed all over the island, didn't they?

A. Well, I seen it come right up to the lighthouse step.

Q. Were you there in 1888?

A. I don't think I was there.

Q. Did you ever know a time—were you ever there when the ocean and the thoroughfare met at North Carolina Avenue, drowned out all the lawns about '90?

A. I have been there every summer but I was always away in the winter. I only stayed there these last thirty-six years. I lived there you see, I was away in the winter time.

WALTER SOMERS, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Somers where do you live?

A. At the present time?

Q. Yes.

A. 25 North New Jersey Avenue, Atlantic City, N. J.

Q. And how old are you?

129 A. 74 next birthday.

Q. And how long since you have lived at Atlantic City; how long have you lived at Atlantic City, rather?

A. Well, I lived since 1866 about.

Q. When did you first come to Atlantic City?

A. Well, I suppose three years before that '66—'63 about.

Q. Were you running a boat at that time?

A. In the summer time.

Q. A sailing boat?

A. A small sailing boat.

Q. In and out the inlet?

A. Yes, sir.

Q. How long were you running a sailboat in and out the inlet?

A. How long had it been?

Q. Yes.

A. Run a sailboat up to two years ago.

The Court: What do you mean, going out fishing?

The Witness: Fishing and sailing parties.

Q. You made a business of taking——

A. Sailing parties out and return.

The Court: Out in the ocean?

The Witness: Out in the ocean part of the time.

Q. You of course, are familiar with the location of the lighthouse and the life saving station, are you not?

A. Well, I am at present.

Q. Well do you remember where the high water mark
130 was when you first noticed it, that is in the vicinity of New Hampshire Avenue and Vermont Avenue; first do you know whether it was above or below Pacific Avenue?

A. Well now, I couldn't tell you that point because I wasn't interested and I never noticed.

The Court: A little louder.

A. I could tell you how near the lighthouse, that is somewhere near; I know it was near the lighthouse.

Q. How near the lighthouse?

A. Well, I couldn't just tell the distance, but I know it was very close.

The Court: Give us the approximate distance to the best of your judgment.

A. (Continuing.) The high water storm tide come up to the lighthouse—well I knew that at one time.

Q. Well, what about the ordinary high tide, about how close would that come to the lighthouse?

A. I don't think there was very much out, I think there was a very bold shore there at that time.

Q. A very bold shore at that time?

A. I think so, I have a recollection of it.

Q. Well can you give us some idea in feet whether it was fifty feet, one hundred feet, two hundred feet from the lighthouse?

A. Well, I would say 200 feet anyway.

Q. It was within two hundred feet of the lighthouse?

A. I should say that anyway.

The Court: You say the shore was bluff, was it?

131 The Witness: Bluff, yes, sir.

Q. Now did you notice the changes from time to time of the shore, whether it washed out or came back or made out, or what it did?

A. Well I am not—I always find since it started to make out since the Government put piers and jetties there is has been making out always, it has been gradually making out.

Q. When did the Government put in jetties?

A. That's something I couldn't tell you because I didn't take any notice at the time.

Q. Do you remember the jetty that was put in above or near Arcadia Avenue?

A. I remember that one was put in there, yes, sir.

Q. Was that the first jetty that was put in?

A. That's the first one to my recollection.

Q. Well, anyway, were jetties placed in the vicinity of the light-house?

A. Yes, sir.

Q. Several of them put in there, were there not?

A. There were three I know, but perhaps more.

Q. You cannot fix the year that they were put down?

A. I cannot, no, sir.

Q. But you remember the beach before the jetties were put down here, do you?

A. Well, now, that's what I stated about, I think it was '67 this thing happened, my recollection it was.

Q. And after the jetties were put down by the Government, how do you say the beach behaved after that?

A. Well, the way I find it is made out gradually all the time and been a making out ever since.

Q. Did you ever know a time when the beach was out as far as it is now, in the olden days?

A. Well, I know at one time, that was when I was a small boy come here, I know there was quite a lot of trees and hills, sand hills down in front of the Atlantic Avenue, between Atlantic and Pacific Avenue.

Q. Between Atlantic and Pacific?

A. Yes, some wheres about there. Why, I know, we had so much trouble about our drinking water at that time, and we had to go there, there was a well there, my being a boy I used to go over to that water, that's why I remember that, otherwise I wouldn't have any recollection of it.

Q. Now, after the jetties were put in by the Government you say there was a slow but steady growth of the beach?

A. That's the way I remember it.

Q. There haven't been any losses in the beach since that time?

A. Well, I couldn't say that, perhaps there has been but made back again.

Q. But the net result has been a slow and steady gain?

A. Yes, taking from one year to the other, not a week or anything like that because it varies, it varies every day sometimes.

Q. Do you know what the general movement of the sand is along the coast, which way it moves?

A. Well, I always heard them talk and say that the inlets work south always, all the way down the coast, work south. Consequently, the inlet works south. It takes that sand away, moves the inlet the same way.

The Court: What is there there at Atlantic City around the point, a bay?

The Witness: No, there is an inlet.

133 Mr. Bourgeois: This is Absecon Inlet.

The Court: Well, the inlet is nothing but a fork in the ocean that goes into the bay?

Mr. Bourgeois: That's all.

The Court: It is sort of a bay made of the ocean, the beach curves in there.

Q. Do you know whether the general trend of the sand is southward along the beach?

A. Well, it is to the south of the inlet; down the coast further we can not say.

Q. Has Brigantine Beach been losing?

A. Always, ever since I knew anything about Brigantine.

Q. And this section of the neighborhood of Vermont and New Hampshire has been gaining?

A. Yes, sir.

Q. Is it the sand that comes over from the opposite beach?

A. We think that, we don't know but we think that's the case. It goes somewhere and it lodges over there in the centre of the inlet or else over on the shore.

134 Cross-examination.

By Mr. Bourgeois:

Q. Mr. Somers, how many years have you followed the water?

A. Well, I have followed the water since '66, that is, the inlet around there. I was on the ocean before, but not in that section.

Q. These inlets frequently have two ways, don't they, or two channels called the north and south channel?

A. That is the case some years.

Q. And sometimes they have only one channel?

A. Only one channel.

Q. Now, do you remember when the Absecon Inlet was a single channel and when you could stand on the Atlantic City side and call across to people at Brigantine Beach?

A. I think I can.

Q. At that time there was only one channel there?

A. There wasn't only one channel open at the mouth of the Inlet then.

Q. That's right. And that was a comparatively narrow channel.

A. Yes.

Q. After awhile it cut in on the Atlantic City side, didn't it for awhile?

A. Yes.

Q. And after a little while longer there were two channels opened up there, one north channel and one south channel?

A. If I recollect there was two ways out there.

Q. And do you remember that the south channel closed and the

north channel became deeper and cut away the Brigantine Beach, when the north channel opened up it cut away the Brigantine Beach and it closed the south channel?

135 A. I remember years that the channel cut through north and the channel working around south and would close up.

Q. And when the south channel closed up that added the sand to the north end of the Atlantic City beach, didn't it, gathered sand there?

A. Yes.

Q. At the present time they are trying to keep the main channel straight out open?

A. That's their object.

Q. At the present time?

A. Yes.

Q. At the present time how far across is it from Atlantic City to Brigantine, about a mile?

A. Yes, easy that a mile and a half to the main beach, but there is middle ground you know.

Q. Yes, I know, but that sand that washed off—well, I won't say that, but when the sand washed off of the end of Brigantine Beach it gathered on the end of the Absecon Beach, didn't it?

A. Well, we suppose that.

Q. Well, it did, it gathered there, it gradually increased. Now, do you remember about Great Egg Harbor Inlet?

A. I don't know anything about it.

Q. You don't know the same thing happened there?

A. Well, I heard it, but I don't know it positively.

Q. Made hundreds of acres of land on Ocean City, the beach, that is the south side of it?

A. Yes.

Q. And over in Ocean City the Government did not put any jetties down, did it?

A. Don't know that they did.

136 Q. Mr. Somers, these northeast storms, these are what do damage to the beach?

A. Yes, sir.

Q. They cut it in how much sometimes at a time?

A. Well, late years it don't wear away very much because they have these jetties all along there.

Q. I don't mean that, I mean in former years when it was way up there so far, it was cut in how much, 100 feet, 200 feet at a time, wouldn't it?

A. I couldn't tell exactly but I know some mornings we would get up and the beach all washed away in one night.

Q. And if you could just have no storms the beach would make up?

A. Well, I believe it would.

Q. Yes. I think that's all Mr. Somers.

137 SILAS SEELY, called and sworn on behalf of the defendant testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Seely, where do you live?

A. Atlantic City.

Q. How long have you lived in Atlantic City?

A. I have lived there continually forty-eight years.

Q. Do you know the lighthouse section?

A. Yes, sir.

Q. Up around New Hampshire and Vermont Avenue and the beach?

A. Well, we didn't use to know much about New Hampshire Avenue that's made up there since.

Q. Yes. Where was the high water when you first knew of the lighthouse section?

A. Well, when I first knew the tide come right to the lighthouse.

Q. And when was it you first knew?

A. That was about forty-eight years ago.

Q. Did the ordinary high tides come right up to the lighthouse?

A. No, sir, only storm tides.

Q. Only storm tides?

A. Because I was right there and seen it.

Q. And how close would the usual tides come?

A. Well, I should suppose where Pacific Avenue would be, about 200 feet, at that corner.

Q. You mean it would cross about Pacific Avenue?

A. Yes, their station is about 200 feet from Pacific Avenue.

138 Q. 200 feet north?

A. Yes.

The Court: Would that be Pacific and Vermont?

(Witness presents to the Court a book.)

The Witness: I got something here.

The Court: Pacific Avenue and Vermont?

The Witness: This was about 46 years ago (indicating on photograph), there is the tide. That book is supposed to be over forty years old, that's better than your map.

The Court: Well, that seems to be a good deal better than your map.

The Witness: That's a good deal better than the map here, that's an old relic.

Mr. Bourgeois: We object to the photographs unless they are proven.

The Court: How long have you had it in your possession?

The Witness: It has been in our possession about twenty years.

The Court: Does it correctly represent the condition as you remember them at the time?

The Witness: Yes, as near as I can remember. Of course, I can remember them before this, because I can remember when the tides come to the lighthouse.

The Court: It comes to the lighthouse on this picture.

The Witness: Not quite.

The Court: Where is Pacific Avenue located in here?

The Witness: There is one shows exactly. There is the lighthouse there; now Pacific Avenue from this way down, now you see there wasn't any New Hampshire at all because here is Vermont above the lighthouse—that map I suppose shows where New Hampshire is supposed to be.

The Court: Pacific Avenue ran this way?

The Witness: Forty-eight years ago there was no New Hampshire Avenue. Pacific Avenue ran this way.

The Court: Where is Vermont Avenue?

The Witness: Vermont Avenue is back there the other side of the lighthouse (Indicating on large photograph). Here is Pacific Avenue; there is a building on the corner of Rhode Island and Pacific.

The Court: Referring to that central picture, where is the lighthouse on that?

The Witness: Well, this one,—that's one corner and the lighthouse is over on this side.

140 The Court: Below the bottom of the picture?

The Witness: Yes, that's Pacific, the lighthouse is along this square, the Government station is on the other street. Now, that is forty-four years ago, but I was at the lighthouse when the high tide washed the sand away from the lighthouse.

Q. Now, Mr. Seely, at the time you speak of.

The Court: What time is that?

A. Why, the first is forty-nine years ago, that is, the first time I was to the lighthouse.

Q. Now, at that time was there any of New Hampshire Avenue at all below Pacific Avenue?

A. No, sir, nor there wasn't none north of it. They were built afterward.

Q. Now, when did it first begin making outward, the beach I mean?

A. Well, that was pretty soon after. Pretty soon after that it commenced to make out, I should judge that the way that map shows it was about five years afterwards.

The Court: The way what map shows?

The Witness: The picture, this photograph.

Mr. McCarter: I think we ought to know whether this witness' recollection is the fact or whether he is testifying from the photograph.

The Witness: We can have the recollection, I was there.

Q. Do you know whether the photographs correctly show situation that you know at that time?

141 A. I do. Why I know, that is by the other photograph that they all compare with what I knew at that time.

Q. Do you remember when the Government put out the jetties in the neighborhood of the lighthouse?

A. Yes, sir, I do.

Q. Do you happen to know what year that was?

A. I could not tell exactly, I should think it was about, as near I could remember, about forty-two years ago.

Q. Then, did the beach begin to make or to lose after that time?

A. The jetties helped it to make, helped the beach to make.

Q. Now, do you know whether the beach has been making or losing since?

A. Well, at times it would lose some, but when it would make it would make out more than it lost.

Q. Has there been a steady growth in the beach since that time?

A. Yes.

Q. Did you ever know the high water mark to be out further than it is now?

A. Not at that point, but I have at other points near there.

Q. Well, speaking now of New Hampshire Avenue, did you ever know the high water mark to be out further, the ordinary high water mark to be out further than it is now?

A. Well, where do you mean, where Maine and New Hampshire comes out there.

Q. Here is New Hampshire, the present high water mark is testified to be down here. Now, in the earlier days was it ever down that far?

A. No, not that I know, it wasn't down any further.

142 Q. The present location is about the furthest location out is it?

A. Yes, at that point.

Mr. Carr: I want to offer that photograph in evidence.

Mr. Bourgeois: That's objected to because it is not proven.

The Court: You may cross-examine him on it.

Cross-examination as to photograph.

By Mr. Bourgeois:

Q. Look at this picture of the lighthouse and tell me where you think the photographer stood to take that picture?

A. Well, that would be pretty hard to tell; I never took a photograph.

Q. Well, he must have stood out in the ocean somewhere, didn't he, that shows the ocean in front of him; that's the inlet up there?

A. Yes.

Q. Now, where could a photographer have stood so as to be high enough to have taken that and shown the top of those houses?

A. Must have taken them from the water. Now these were probably taken from the lighthouse.

Q. Now, that's all right, that's different, but I want to know where the protographer could have stood so that he would have been high enough to have got the trees and other objects beyond the houses back of him?

A. He could take them from the lighthouse.

143 Q. But he could not take the lighthouse if he was in the lighthouse, he must have stood out here somewhere. Does that look to you as if that is a drawn picture, not a photograph?

A. Well, I took it from the others.

Q. Well, I know——

A. I know but they all show so plain.

Q. They could have taken all them from the lighthouse, but where could they have taken the one of the lighthouse? Isn't that one of the lighthouse a drawn picture?

Mr. McCarter: They would have to have an aeroplane to do it, they didn't have any then.

The Witness: They didn't have any then.

Q. Now, this bulkhead along here indicates practically you say Pacific Avenue; that's Pacific Avenue, isn't it? Pacific Avenue is running along that way?

A. Yes.

Q. Now, what streets can you see along there; you can not see New Hampshire, you can not see Vermont either, can you, the houses prevent you from seeing either of those avenues, do they not?

A. At that time there was no houses on New Hampshire, that is, forty-six years ago.

Q. You are quite sure about that?

A. Oh, there might be a shanty or two.

Q. Now, can you see those shanties there or are they covered up by the other houses?

A. They are houses.

Q. Can you see Vermont Avenue?

A. I only see the stations there.

Q. Yes, right at the rear of the station Vermont Avenue
144 is just beyond this one building next to the lighthouse, right out like that?

A. Yes, sir.

Q. Right where that pencil is, New Hampshire comes right there one square above, don't it, it would come out right where that pier is approximately, wouldn't it?

A. Well, it would now, yes.

Q. Well, apparently there was something there at that time, the flagpole is just about that point, but there are trees still further up here, that's true, and other houses up on the point of the beach, isn't that true?

A. Yes, the flagpole is there.

Q. And you can not tell whether New Hampshire is on that map or not because you can not see it.

A. You can not see it.

Q. Because it would be hid by the houses if it were there, wouldn't it?

A. Yes, if that's taken that way, no doubt about that.

Q. How old are you, Mr. Seely?

A. 67.

Mr. Bourgeois: Now, if the Court please, we object to that photograph because that cannot be a photograph to begin with, that is of the lighthouse cannot be a photograph. There is no place from which that could have been taken. That is simply a picture that has been photographed. That may be true of all of them.

The Court: Well, I think the witness wants to keep this anyway.

The Witness: Yes, I guess he does.

145 Mr. McCarter: He has the photograph made before photography was invented.

The Court: I don't think I will admit it Mr. Carr.

(Hearing adjourned to Wednesday, October 10, 1917, at 10 A. M.)

146

Wednesday, October 10, 1917—10.30 A. M.

Case Continued.

Appearances: Same.

Mr. Carr: If the Court please, a number of witnesses I put on yesterday I think were really in rebuttal, there are still quite a number of elderly gentlemen here who would like to be heard and get away. One of them is in the Government service. If I may proceed in that way I will do so.

The Court: All right, proceed, it does not make a whole lot of difference how we proceed.

THOMAS J. HORNER, called and sworn on behalf of the defendant testified as follows:

Direct examination.

By Mr. Carr:

Q. Captain, you live at Atlantic City?

A. Yes, sir.

Q. How long have you lived down there?

A. I came to Atlantic City in '77.

Q. And have been living there ever since?

A. Off and on, yes, sir.

Q. Was that the first you had been to Atlantic City, in 1877?

147 A. Yes, sir.

Q. And how old a man are you, please?

A. I will be 70 next birthday.

Q. Do you know the beach in the neighborhood of Vermont, Rhode Island and New Hampshire Avenues?

A. Yes, sir.

Q. What did you do in Atlantic City in the early days?

A. I was on the police force.

Q. And what was your beat?

A. My beat was from Massachusetts Avenue up to the inlet.

Q. How many years were you patrolling that beat?

A. Only in the summer-time, that three months.

Q. One summer or several summers?

A. One summer.

Q. When did you first know that section of the beach?

A. Fifty years ago.

Q. For about fifty years?

A. For about fifty years.

Q. Are you familiar with it at present?

A. Yes, sir.

Q. Do you know where the high water mark came in the vicinity of Vermont and New Hampshire Avenues when you first knew the beach in 1850?

A. Yes, sir.

Mr. Bourgeois: 1850.

Q. Oh, pardon me, fifty years ago.

Mr. Bourgeois: 1869 or 1867.

A. Yes, sir.

148 Q. Where did it come?

A. I will tell you. When I show this to the Court if it will admit it after a bit.

Q. Well, first tell me where it was from memory, won't you.

A. Well, my memory when I have a contract to put the buoys down at Absecon Inlet under the Government.

Q. Do you remember when they put the jetties out in the vicinity of the lighthouse?

A. I do.

Q. Did you work on that job?

A. I did not.

Q. And when was it they put out those jetties?

A. I could not tell you, I did not keep no record of it.

Q. Can you give us some approximate idea?

A. I was married in 1882 and I think it was put out in the neighborhood of '82, sometime, or previous to that more than likely.

Q. Do you know where the high water mark was when they were put out the jetties?

A. There was no high water mark.

Q. Well, the ordinary high water mark I mean?

A. I don't think there was ever any high water mark or low water mark either.

Q. Well, tell me in your own way where the water came?

A. Well, the water came then, when I show this to the Court where the water came at that time.

The Court: Now, tell us, don't both showing us.

The Witness: It came to one corner of the lighthouse lot at the time.

149 Q. That would be above Pacific Avenue, between Black Island and Vermont Avenue, would it not?

A. Yes, it would be there.

Q. And where was New Hampshire Avenue then?

A. New Hampshire Avenue then ran on Atlantic Avenue, it ran down to the Black Lot.

Q. Where was the Black Lot, can you point out about where it was?

A. That Black Lot isn't on here. That's the lighthouse then. It cut across—I will show you on this sketch I have, across on a certain angle to Massachusetts.

Q. You say you made a sketch to show that?

A. This morning, yes.

Q. Have you got it here?

A. Yes.

Q. May I see it?

A. Yes, if it pleases the Court.

The Court: You show it to them.

Q. What is the sketch that you now produce, just tell his Honor what it represents?

A. This represents where I was on the boat when I was on the police force from Massachusetts Avenue to the inlet.

Q. And what does this line here—

A. There is where Massachusetts ended before you got down to the Boardwalk. There wasn't any Massachusetts ran any further than this on Pacific, it ran here to the lighthouse and cut off part of the lighthouse lot.

Q. You mean Pacific ended at the lighthouse at that time?

A. Pacific ended at the lighthouse at that time.

Q. It was not in existence east of the lighthouse?

A. No.

150 The Court: What was there east of the lighthouse?

The Witness: Nothing.

Q. What about Vermont Avenue?

A. Vermont Avenue ended here to the Black Lot, this is Atlantic here, you see it ended here at Black Lot here. This cut part of Black Lot off here you see.

Q. That is, Atlantic Avenue ran east of Vermont for about how far?

A. From out to the Boardwalk now you mean?

Q. No, from here to here.

A. I suppose that lot is about 200 feet.

Q. That is, Atlantic Avenue stopped about 200 feet east of Vermont.

A. Yes.

Q. Where was New Hampshire Avenue?

A. There was no New Hampshire Avenue.

Q. There was no New Hampshire Avenue at all?

A. That was—no.

Q. Now, as to what time are you speaking?

A. I was speaking, I didn't take no record of that at that time, but I think I was on the police force in the neighborhood of '79 about.

Q. And that's the condition you found in 1879?

A. That's the condition I found in 1879 when I was on the police force up here.

Q. Now, I see some memorandum of figures here. Take the figures 778 in the line of Atlantic Avenue extended, what does that mean?

A. That means from this point here where the high water mark was here out to the present high water mark now what you call the present high water mark.

151 Q. 778 feet?

A. 778 feet, yes.

Q. Now, I notice the figures 963 feet in the line of Pacific Avenue extended, what does that mean?

A. That's where it cuts from the lighthouse down to the present high water mark now.

Q. And I notice the figures 1,110 feet in the line of Massachusetts Avenue extended, what does that mean?

A. That means that the line came from here outside the Burkhard property down to the Boardwalk where it extends now the high water mark, 1,110 feet.

The Court: Where did you get those figures?

The Witness: I measured them myself.

The Court: Recently?

The Witness: Yes.

Q. Now, the mark here, Boardwalk, does that indicate—

A. That indicates the Boardwalk.

Q. The present location of the Boardwalk?

A. This indicates the high water mark outside the Boardwalk.

The Court: The line that you mark "H. W." is the high water mark?

The Witness: Yes, "H. W." is the high water mark. And on Baltic Avenue it is 315 feet, and when you get up further out to the inlet it would come out there to a point you know.

Q. You made this sketch yourself?

152 A. Yes, this morning.

Q. You made the measurements yourself?

A. Yes.

Mr. Carr: I did not know anything about this but I will do the map.

The Witness: I just thought it might help the Court along.

Mr. McCarter: Now, if your Honor pleases, I really think ought to be told by counsel what his theory is of the materiality of this evidence. I have not heretofore objected because we are going along in a friendly way and there is an important question he wants to be finally determined, I am as anxious as anybody else to think to have every possible point of view illuminated, but I fail to see, and I would be glad to be enlightened as far as I am concerned at the present time, upon the materiality of this evidence.

Mr. Carr: Well, if the Court pleases, this is really rebuttal by way of anticipation. I explained at the outset my view is that our prima facie case was established when we showed a title in the defendant proceeding from the common grantor plus the state's riparian grant that that made out a prima facie case. This is entirely by way of rebuttal and based upon certain allegations in the bill, which was put in the amended bill, which went to show what I presume is intended to be the theory of evulsion, that this land was lost by great storms, and that because it was lost suddenly and by evulsion, instead

153 of being lost by erosion that there is some different right in the complainant, he has not lost his title as he would have lost it if he had lost it by erosion. I think that is the theory of the plaintiff's case, I think he claims some peculiar rights because of that fact. Some of the textbook writers do make such a distinction although it has not been recognized in New Jersey. All that I can possibly do now is to get the story before your Honor, showing the conditions of these high water marks, we have all, in the previous trial of this case, we all attached sufficient importance to the high water marks to have them shown on these maps, Mr. Bourgeois as well as myself. If the position of the earlier high water marks is not material, why of course, this is not material at all, but here is a witness now who shows the conditions as he knew them, from actual knowledge in 1879, the position of the high water mark at that time. Our theory of this case is the defense of res adjudicata does not apply, we bought from the Atlantic Beach Front Improvement, who was the owner of the common title. At the time he bought—that is our predecessors in title bought the shore line ran approximately along the dotted line, now marked, "Line of outside sand hills." It is our view that the common grantor could not assert against us any retained territory between high water mark of 1852 if it were a fact further out than the present high water mark, and he could not retain such a right, that we have a natural right—would have a natural right to accretion and that natural right would be to an equitable division of the accretion formed along the common shore line.

The Court: What part of the land does the plaintiff claim, the triangle?

154 Mr. Carr: The defendant claims the triangle, the plaintiff's title is beginning at Dewey place running 190 feet down beach when of course, he is intersected by this riparian grant, the riparian

grant intersects him here, it does not close him off. Instead of his not getting the land he gets more land, but he gets it in a different location.

The Court: What part of this plot marked "A," which was in the Bartlett grant, was it that the plaintiff claims to own?

Mr. Carr: The plaintiff claims to own 190 feet right straight down this way. Then he also claims the right to follow this angle here down to the exterior line, down to the line of 1852.

The Court: What do you mean, up that way?

Mr. Bourgeois: That is the part that is disputed, that triangle in there.

The Court: That is the very point I was speaking of, this triangle right here.

Mr. McCarter: I would like the opportunity to confer in the other room for just a few minutes with Mr. Bourgeois and Mr. Arnold.

Recess.

155

Afternoon Session.

Mr. McCarter: Well now, may it please your Honor, I feel relieved that my suggestion provoked the frank discussion that counsel has given us with reference to his ultimate claims here and I think that he is not in a position to make that claim. Your Honor recalls, as we said yesterday, the act under which we are proceeding in this case requires if it requires anything at all that the defendant specify in his pleading the claim that he makes to the property, the possession of which is in the complaint and the quieting of which is the ultimate purpose of the suit. There isn't any other statute like it that I know of and Vice-Chancellor Stevenson, in a case and one or two others of our Judges, have returned the idea that the whole purpose and object of the act is that the defendant when he files his answer must specify in the language of the statute exactly what claims he makes to the locus in quo so that the complainant knows what his claim is. Now, pursuant to that requirement the defendant has specified in his answer but one thing and that is the riparian grant, he has not suggested that he has got any right by accretion, that he has any other title to this locus in quo in dispute here than the right that he thinks he obtained by that grant, and to give a lot of evidence here now designed to show that whether his riparian grant which we claim is void as to us is good or bad, nevertheless he has got a title by accretion which is going to be apparent basis of his ultimate claim here is such a departure from the situation as that I think it should not be permitted. It is not the case of an ordinary pleading where you
156 would set up a certain thing and come in and prove something else and make the punishment fit the crime by amending your pleadings at all. If your Honor desires I will read the cases to you which show that the purpose and object of the act is to require the defendant to come in and specify what his claim is to our property and having specified it to prove the title specifically, not prove something else, and we respectfully therefore insist—

The Court: Well now, he says that he completed his case when he put in the riparian grant. Now he says this is all by way of anticipation merely for the purpose of making it convenient in letting these elderly gentlemen leave so that they won't have to be brought here again.

Mr. McCarter: Well, he said, too, your Honor, as I understand him, and I think he will say I am right about this, that the effect of this evidence and all other evidence that he is going to offer is ultimately to get him entitled to claim this locus in quo on the doctrine of accretion and the way the side lines run and that whether his riparian grant which he has put in be good or bad doesn't make any difference, nevertheless it is accretion and it is accretion in front of his property, and the lines being run the way that the grant ran he would get it by accretion if he did not get it by the grant. Well now, he has never suggested such a thing in his pleadings. It is the first time we ever dreamed that he had such a claim.

Mr. Carr: Mr. McCarter, I hate to interrupt, but it is not for that purpose at all. Of course, the case never runs quite smoothly when you call witnesses out of turn. I have made that out my prima facie case and am satisfied with it. I am calling in these old gentlemen who desire to get back to Atlantic City, at this time, and necessarily I have to anticipate some of what your proofs may be, and I may not be guessing entirely right. If I am not guessing entirely right it may be that this testimony is not relevant but that is a risk that has to be run if it is taken out of turn. Of course, if you object to its being taken out of turn I will have to keep these old gentlemen.

Mr. McCarter: It is not that we object to the mere order of proof but I understand the effect of this evidence, whether it comes now or later, it makes no difference to us, when it comes—the time and the offer makes no difference—as I understood counsel, I may be wrong, his idea was that he might claim here under some theory of accretion and if this evidence either offered now or offered later tends to support that kind of a claim we object to it.

The Court: Well, I don't understand that that was his point. I take it—I may be entirely wrong, what his point is that at the time of the grant by the riparian commissioners the high water line was at a point about where the ground begins to go eastward or towards the ocean and that therefore that was all land under water that was covered by the grant, and therefore that he had a right to it, isn't that your point?

Mr. Carr: Yes, that's my theory.

Mr. McCarter: If that's his point we are perfectly willing to meet that case, but I certainly misunderstood him at the time. 158 My associates did the same, because we have all gotten out from the remarks Mr. Carr made to your Honor the idea that I hope ultimately in this case in the event of our being able to satisfy your Honor that if it be true that at the time that grant was made that it commenced at the high water line, it certainly isn't any longer true, and our claim is that that high water line

an ambulatory line and that the private owners' line goes out to the high water as it increases by accretion, and that a state's grant is taken subject to that right of accretion, and that the state can not grant something as against the private owner that becomes his by law of accretion. Now we are prepared to meet that and I think my friend realizes that and is trying by this way of giving these gentlemen the appearance of age and infirmity, which I don't think the captain on the stand deserves, to slip in some evidence here which will aid him when he ultimately comes to make such a claim. Now, if he has any such claim I object to it because he has not specified it. We are perfectly willing to have the situation at the time the grant was made and the present situation, that is the case, of course, but to have it brought out that this case could be supported by the defendant on the theory that regardless of the grant he has got some rights by accretion we object to it. Now, with this talk why it may be better to let the evidence go on, but we don't want any misunderstanding about this.

The Court: Well, we will let the evidence go on.

Mr. McCarter: We have no possible objection to the order of proof if these gentlemen want to go away, that does not bother us a bit.

159 The Court: Mr. Carr offers in evidence the sketch made by the Captain which is made for the benefit of the Court and which I think in view of the labor he has gone to I should accept.

The Witness: I just took it off this morning, I had nothing to do.

The Court: All right mark it in evidence

(Sketch marked Exhibit D12.)

By Mr. Bourgeois:

Q. What is the scale of the sketch?

A. No scale there at all, I wasn't attempting to make it.

Q. Well, is it the same scale both ways?

A. You see north there don't you?

Q. With the same scale—take this as Massachusetts and Rhode Island, that was about how many feet on the ground?

A. I did not measure that.

Q. Well, it is 350 feet isn't it?

A. Yes, that's about the width of a block.

Q. Now, the distance between Pacific and Atlantic is 500?

A. Yes.

Q. Then your scale would seem to be elongated?

A. Well, I didn't make it correct you see, because I had not time.

Q. Now, take this line you had for the high water line in 1877 running from Pacific Avenue down, did not that line bear further to the west—you see you have gone across Massachusetts and Connecticut Avenue. Now, it crossed Connecticut Avenue at a

160 distance of about 100 feet below or 150 feet—no, about 200.

A. Suppose we curve this a little and run it down to New Jersey where the Wright property was.

Q. Didn't it run from this point on a curve like that?

A. Well, I didn't make that. After you get down past Massachusetts Avenue it did.

Q. Yes, curved on around.

A. Yes.

Q. And it wasn't more than about two or three hundred feet from the southerly line of Pacific on Connecticut until you came to the water line, was it?

A. Curved there you know.

Q. Yes, and then you went on down that same line and it curved in almost parallel, ran almost parallel with Pacific until it got down to Missouri, didn't it?

A. No.

Q. How far down?

A. I don't think it ran down further than South Carolina.

Q. All right. And down, when it got to South Carolina, rather down at Pennsylvania, that's three squares above South Carolina towards the inlet?

A. Yes.

Q. When you were down at Pennsylvania it was in how near to Pacific Avenue?

A. I didn't measure it.

Q. Well, you can recall, can't you from memory?

A. No, I couldn't tell you, I was not down there.

Q. Can't you remember where the Seaside House used to stand?

A. Yes.

161 Q. Right close to Pennsylvania about 150 feet?

A. Yes.

Q. And from that point along the high water line ran on a curve after it got up to Connecticut to the point you have mentioned in Vermont?

A. It ran in a short distance, the Boardwalk;—now, I guess a couple of—in fact up to a thousand feet.

Q. Now, assuming for the purpose of this question that the line outside of the high water mark as you remember it back of the time, the accretions made upland from the ocean, that would include these hotels, would it not, first the Seaside—well, let's go down to South Carolina?

A. That may be the Seaside.

Q. Well, I mean where they now are, let's go as far as South Carolina.

Mr. Carr: Pardon me, is this your general cross-examination?

Mr. Bourgeois: Yes.

Mr. Carr: I had not finished.

Mr. Bourgeois: Oh, I beg your pardon?

Mr. Carr: I thought you were cross-examining on the map.

Mr. Bourgeois: I thought the Court admitted the map.

The Court: I did and I think I would have been lacking in politeness if I hadn't.

Direct examination resumed.

By Mr. Carr:

Q. Captain, do you know where Tim Parker's cottage was or is on South Vermont Avenue?

A. Well, I remember when he built the cottage there.

Q. Right across from the life saving station?

A. Right across from the life saving station.

Q. Can you indicate it on this colored lithograph map of Atlantic City? Here is the station, it is marked, T. H. Parker, is that the house?

A. Yes, that's the house, there.

Q. Now, when that was built do you know where the water came?

A. I don't think the water came anywheres nigh that at that time, but when the cut came across from the lighthouse his house stood on piling if I am not mistaken.

Q. The water came right up to it?

A. The water came under it.

Q. Then the water came then up to about the life saving station?

A. It came across here from Vermont, cut one corner of the lot off, it cut one corner of the lighthouse lot off. Here you see, just the corner here is where the Government put jetties in there to save the lighthouse almost in Vermont Avenue.

Q. Captain, do you remember any great loss of land from storms in this locality since you have known it?

A. Well, yes, the line now where the high water mark is now is almost out as far as it was fifty years ago, I don't think it will ever go any further because there is permanent sod there, never been cut away, almost ten or fifteen feet of water right down after you

drop off the sod. That's permanent beach there. All the sand washes off the beach, washes under there, in there, goes and makes sand somewheres else, and makes a bar somewheres else.

Q. Well, where do you say the high water mark is today?

A. There is no high water mark today.

Q. Well, where does the water come as compared with where it came fifty years ago?

A. I saw it wash up there to Connecticut Avenue, you might call that a high water mark.

Q. I don't mean storm tide you take the dry land. Is there as much dry land or more dry land or less dry land than when you knew it fifty years ago?

A. I think it is just about permanent where it was fifty years ago, it is just about as far out now as when I first had the contract with the Government to put the buoys down.

The Court: I don't understand that, that fifty years ago the land was quite a ways back.

The Witness: Back from where it is now?

The Court: Yes.

The Witness: No, I think it is now just about where it was fifty years ago.

The Court: Well, I know before, the water came up to the lighthouse, fifty years ago.

The Witness: Well it did.

The Court: Now, it is several hundred feet southeast.

The Witness: It cut down to sods then.

164 The Court: I don't care anything about the sod, where did the water come to fifty years ago?

The Witness: It come to where it is now in my opinion.

The Court: I thought you said it came up to the lighthouse.

The Witness: It did when the beach cut away, then it came up to the lighthouse.

The Court: Then gradually the beach went out further and further?

The Witness: Then gradually the beach went out further and further until it got now where it was fifty years ago.

The Court: Well then, there was a sudden cut before fifty years ago or right after fifty years ago?

The Witness: Yes, that came up to this Vermont Avenue here and cut off a part of Black's Lot and went across here to the lighthouse.

The Court: Well, was that a sudden cut?

The Witness: No, gradual cut.

The Court: Well then, when was the highwater mark up there?

The Witness: Why, I think that I was on the police force in 1877 if I am not mistaken.

The Court: Now then, you don't know anything about 165 of your own knowledge where it was fifty years ago, do you?

The Witness: Fifty years ago is where it is now.

The Court: How do you know that?

The Witness: I was attending the buoys, had a contract under the Government.

The Court: And between 1867 and 1877 the high water mark had receded or rather the ocean had encroached?

The Witness: Had encroached on that property.

The Court: From the place where it is now up to the lighthouse?

The Witness: Up to the lighthouse.

Q. Do you know how that was worked, would it work away gradually or suddenly or how?

A. Why it worked away gradually and it moved out gradually after the Government built that jetty there.

166 Cross-examination.

By Mr. Bourgeois:

Q. Mr. Horner, go back to where we were talking when Mr. Car interrupted us. What hotels are now in Atlantic City that would be on this accreted land beginning with South Carolina Avenue and running north, the first avenue is North Carolina, and on North Carolina you have the Chelsea and Haddon Hall, don't you?

A. Yes.

Q. The next is Pennsylvania, and on Pennsylvania Avenue you have the Strand and the Seaside and next that you have, where there is a hotel, is at States Avenue, the St. Charles, next above that at New Jersey the Breakers, next above that at Pennsylvania Avenue you have the Royal Palace; they are all built now on land that is made since 1867, aren't they?

A. Yes.

Q. And when you come down below South Carolina Avenue you have the Traymore and the Marlborough and the Dennis and the Shelburne, all built on land that has been made by accretion since 1867, aren't they?

A. Yes.

Q. Now, about the early history up there Mr. Horner. They used to have some severe storms up there, didn't they?

A. Lots of them.

Q. And those storms would cut the beach away very deeply wouldn't they?

A. Sometimes they would.

Q. Then after the storm subsided it would gradually make out, sometimes much, sometimes little?

167 A. Yes, sometimes much, sometimes little.

Q. And then another storm would come along and that cut it away and that's been the history at that point of the beach first a storm would cut it out, and then gradually regain or maybe it would not regain; another storm would come along and cut some more out, but taking the whole forty or fifty years, it has been gradually to replace the land that was there cut and gradually replace by accretion?

A. I think sometimes the storms did not cut it away much.

Q. Depends on what direction the wind was and how severe the storm?

A. And how the current was running.

Q. Now, you say there is a sod bank where the fast land now is, that is allowing for the slope of the beach?

A. That solid bank runs from the inlet down to about Pacific Avenue.

Q. And that limits the extend of the high land in your theory?

A. Yes.

Q. In other words it won't go beyond that high bank?

A. Never goes beyond that solid bank again.

Q. But if it cuts in from that it will gradually make out to it again and that part will be ambulatory, first out and then in?

A. If it makes out that solid bank then it won't go no further.

Q. What evidence have you about that solid bank?

A. I have caught a many a black fish there.

Q. I see. In fishing you can tell?

A. Yes, I fish there most every year.

Q. And what is the drop when you come to that——

A. It will drop off to about ten or fifteen feet.

168 Q. Almost perpendicular?

A. Almost perpendicular.

Q. And that you say extends where?

A. That extends from the inlet down to about Pacific Avenue.

Q. Now, these accretions that are made up there, you say they are gradual, have they ever been so that you could see them make up, you could not tell from day to day that they were making up?

A. What's that?

Q. You could not see it made up from day to day?

A. You could not see it until after it got made up.

Q. You could see it after it had got made up but could not see it actually making up?

A. You could not see it was all made up until after it was actually made up.

Q. Now, where those buoys set that you set?

A. We set one in the inlet, then we set one between the bar and above the inlet, then we set one outside, what we call the sea buoy.

Q. They were set for the purpose of marking the channel?

A. Marking the channel.

Q. Do you remember the Government jetty—you weren't there when that was built, were you?

A. Yes, I was here.

Q. Where was it built from?

A. That was built out Baltic Avenue somewheres, about Grammercy Place there.

Q. And ran out into the inlet?

A. Yes, sir.

Mr. Bourgeois: Now, let's see if we can show the Court also that.

The Court: We had better mark this, there is offered in evidence and accepted by agreement and may be marked

169 Plate No. 1, part of Atlantic City, that is given the designation as D13, you have no objections?

Mr. Carr: No, except we don't want to be bound by the location of the high water mark there.

The Court: Merely for the purpose of reference.

Q. Here is Arctic Avenue or Grammercy Place, there is Baltic or Madison—referring to D13. Indicate as near as you can where that jetty was built. Now they ran a track right from the railroad—

A. They ran a track right from the railroad, it came out I think at Atlantic Avenue and then ran down almost to Baltic, then spurted off again out into the inlet there.

Q. I don't quite understand you. The railroad swings around from Atlantic up here across Grammercy Place or Arctic Avenue where did they switch off to build the jetty? They ran the track right out on that jetty, didn't they, when they were building it?

A. Yes.

Q. Now, where did they leave the beach?

A. I think they left the beach between Grammercy Place—

Q. Grammercy and what?

A. And Atlantic Avenue or I have never took a record of that, or else up to Baltic, it ran up there somewheres.

Q. Somewhere in the neighborhood of Grammercy Place?

A. I could tell you if I was up there, I could show you where it was.

170 Q. Now, do you know what that jetty was built for?

A. To protect the beach, protect the lighthouse.

Q. Or was it to divert the channel so that it would not come into the lighthouse?

A. Built there to protect the lighthouse.

Q. To change the course of the current?

A. To change the course of the current, yes.

Q. How long did that remain there, do you recall?

A. I should think that remained there in the neighborhood of four years or five years before it was covered up. Now, it is all covered up, you can not see it.

Q. I think that's all.

Redirect examination.

By Mr. Carr:

Q. Captain, during these storms that would sometimes wash away a part of the beach, would you see the land actually being lost during the storm, or would it be after the storm was over?

A. It would be after the storm was over.

Q. It was sufficiently violent and abrupt to see the beach go?

A. You could not see it go.

Q. It would be carried away, particles of sand, would that be the idea?

A. After the storm was over you could go down and see how much was cut off that.

Q. But you could not see the progress of the loss?

A. No, you could not see while it was cutting.

Q. You could not?

A. No.

171 Recross-examination.

By Mr. Bourgeois:

Q. Do you remember when what is now the point of the beach, the land below Pacific Avenue and easterly of New Hampshire Avenue was wood?

A. There used to be high cedar trees there, a big bluff.

Q. Now, were you ever there when there was a storm and saw those trees fall in?

A. I have seen them after they have fell in.

Q. After they have fallen in?

A. Yes.

Q. Have you ever been there when there was a storm and seen the sand hills fall in?

A. Oh, les, lots of times.

Redirect examination.

By Mr. Carr:

Q. Captain, would that be occasioned by the water cutting under them?

A. That come in under the beach, undermined the trees and the would fall over into the surf.

Q. But you couldn't see the cutting process?

A. No, you couldn't see that.

Q. That's all.

172 ALFRED B. SMITH, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Smith, do you live at Atlantic City?

A. Yes, sir.

Q. How old are you?

A. I am sixty-five years.

Q. How long have you known the beach at Atlantic City in the neighborhood of New Hampshire and Vermont Avenues?

A. Well, as a boy I must have been around there somewhere about in the sixties. I might qualify that by saying I used to go there to Mr. Sharp's and play with his son around there, Sharp the rifle man shoot the rifle during the days—that was in the sixties. I would be there quite frequently.

Q. You would be there quite frequently?

A. Yes, sir.

Q. You have known the beach ever since?

A. Yes, off and on I have been there more or less.

Q. Now, when you first knew the beach do you know where the high water mark was?

Mr. McCarter: You are speaking of ordinary high water?

A. I don't know that I could give that exactly. At that time there was just little incidents that seem to have stamped themselves on my mind more particularly.

Q. Well, will they help us know where the high water mark was?

173 A. At that particular time?

Q. Yes.

A. I don't know that it would, no.

Q. Well, tell us in your own way where the high water mark was.

A. I recollect when the tide was very close up to the lighthouse. One thing stamped that on my mind was that at that time a Mr. Evart who was a mover of houses—he was ready to take the contract to move the lighthouse for the Government back and certain addi-

as in it. I believe that the Government did not think that was the thing. It was then looked upon as an immense undertaking, to move the lighthouse back. That was somewhere around, I don't know—I should think maybe in the early seventies.

Q. Was that before they built the jetties to protect the lighthouse?

A. Yes, I think so.

Q. Do you remember the fact that jetties were built in the neighborhood of the lighthouse?

A. Yes, I recollect when the Taxis jetty as we knew it to be.

Q. What was that?

A. That was built by the Camden and Atlantic Railroad. Taxis was their master mechanic, we generally knew it as the Taxis jetty.

Q. Is that the jetty that was run out?

A. The railroad ran out.

Q. Arctic Avenue?

A. Yes, piled out and stone dropped in.

Q. Afterwards were there other jetties built in the neighborhood of the lighthouse?

A. There was what we called the Government jetty, built down there—I couldn't give you the exact dates on that, but somewhere so far apart.

Q. You say the early seventies?

4 A. I should say somewhere about '72 or '73, thereabouts, to the best of my recollection.

Q. Could you indicate on any of these maps about where the water was when you first knew it? Here is the lighthouse—referring now to Exhibit D13. There is the life saving station.

A. Yes, I understand that. There is Vermont. It seems to me that—that about somewhere about 200 feet from the lighthouse the tide was. I mean that was when it was encroaching close there.

Q. It came about 200 feet south of the lighthouse?

A. No, more the east of the lighthouse.

Q. Can you indicate with the pencil about where?

A. Well, I should think that it went across this corner here, somewhere.

Q. Just put a mark on there.

(Witness marks a line X—X.)

Q. And then coming across to New Hampshire Avenue or Vermont, where would it go?

A. Well, I could not tell you much about that really; I know it went around that way. There was a big pool of water inside there.

Q. Do you know whether New Hampshire Avenue was there at all south of Atlantic Avenue?

A. I could not say whether that was graded or not, I don't recollect so much about that.

Q. Well at any rate it came across from X to X?

A. Came across that way to Pacific.

Q. And did it bear away in that same general direction or take a turn or what?

Mr. McCarter: He says he doesn't know.

175 A. I could not exactly say that from the fact my attention was more to the lighthouse than anything else above or below it.

Q. Now, from the time that you first knew the beach in the vicinity, has it made or lost?

A. Oh, made considerably.

Q. In the earlier days do you ever know of a time when it was out as far as it is at the present time?

A. I don't know that I could tell exactly that, I can not just locate Sharp's place, it was all cedar trees on his lot at that time that we used to go down there and shoot the rifles, I don't know where that was, I have never picked up a map to inform myself about that. I know we used to go there and have a target. He was a friend of my father's, and his son and me used to go together more or less. At that time my father lived at Brigantine.

Q. Brigantine is right across?

A. Yes, sir.

Q. Well, do you ever know of a time when the high water mark was out further than it is now, in your experience?

A. Not down here, I don't think that I ever did, no. Them accretions come from the washing away of the lower end of Brigantine.

Mr. McCarter: Well now, I don't suppose this gentleman really knows the origin of the accretions, it would take an expert to tell us.

Mr. Carr: You don't want it on the record?

Mr. McCarter: Well, I don't think he ought to volunteer these very technical and highly scientific answers, he has his own theories about it.

176 Q. Let's see whether he does know. Do you know how the beach came to make up over in the vicinity of Vermont and New Hampshire Avenues?

A. Well, it is by accretion, and the accretion comes in my way of thinking from the Brigantine because it is washed that way.

The Court: What makes you think that?

The Witness: Because it has gone from Brigantine—all the sand has gone to the inlet and brought it over that way.

Q. Do you know what the trend or movement of the sand is about that section of the coast?

A. South.

Q. All south is it?

A. South.

Q. How long has that southward movement been going on, as long as you know?

A. I could not tell you that, long before I was born.

Q. In all your experience the sand has been moving south?

A. Yes, then it will make up some little time.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Smith, your father lived on Brigantine Beach?

A. Yes, sir.

Q. And raised there?

A. Wasn't born there, no, sir, we was there in the early days, would be there about six months in the year, in summer-time. He kept a hotel.

177 Q. Brigantine Beach is the beach north of Absecon Beach, immediately north of Atlantic City?

A. Yes.

Q. Now, Absecon Inlet separates Brigantine and Absecon Beach?

A. Yes.

Q. Now, on the south of Absecon Beach comes Great Egg Harbor Inlet?

A. Yes.

Q. And then Pecks Beach on which Ocean City is built?

A. Yes, sir.

Q. Then north of Brigantine comes Little Egg Harbor Inlet?

A. North of Brigantine—Brigantine is between Little Egg Harbor and there—but Little — Harbor is north of Brigantine, yes, sir.

Q. Now then, I understood you to say that the course of these inlets—I mean the channel of the inlet is to gradually move south?

A. The channels of the inlet will move south and then they will fill up and then break out further and then drift down again.

Q. That's been his story repeated time and time again?

A. Yes. You take the one they have now, if they hadn't the dredger there the inlet would break out in the northern part and go south.

Q. The inlet would go south in what we will call the north channel, that washed away the lower end of Brigantine Beach, didn't it?

A. No, I don't think that, I don't quite agree with you on that.

Q. When did the north end of Brigantine Beach wash away?

178 A. The north end of Brigantine Beach—we had what we called the Little New Inlet just above Absecon Inlet as we know Atlantic City by. That did not cut away because then I could go away down and holler to a man on the Atlantic City Inlet and be understood, then when the company at one time got over there and went to fill this little inlet in then the water came and cut away the south end of Brigantine. That could be explained by a map. Of course, this is not in evidence, I won't show you that.

Q. Let me ask you one other question to bring out the thing I have in mind. When the channel would break out in what you would call the north channel——

A. Yes, sir.

Q. (Continuing:) Then the south channel would gradually fill up and the beach would make on the upper end of Atlantic City?

A. Well, I don't know as it done that so much.

Q. Well don't you remember Mr. Smith that it did make up from the lighthouse all the way out there?

A. Yes, it made up there.

Q. I expect you remember in 1897, when they had an extensive sale of lots there, that end that had been made up by accretion, the Eldridge Estate?

A. I may have heard that, I don't recall that.

Q. Well, now, do you know where this jetty was thrown out by—you say by the railroad company, the Camden Atlantic Railroad Company.

A. Mr. Taxis, I think he is employed by the railroad company—I don't know as I know the exact location, although I have played there lots of times.

Q. He was the chief engineer of the Camden Atlantic Railroad Company?

A. Well, he was connected with the Camden Atlantic Railroad Company in some way, we always knew it by Taxis Jetty.

179 Q. But the Government paid for that jetty, didn't it?

A. I don't know.

Q. It was known generally as the Government Jetty?

A. What we call the Government jetty was another one, but we used to call this Taxis. Maybe the Government paid for it, I don't know.

Q. What you call the Government jetty was made of boxes?

A. Cribs.

Q. Put down from the channels inside of—from the high water mark out, or put down in the channel and run part of the way in.

A. Yes, cribs.

Q. That did not protect the beach, did it?

A. I can not say about that, I guess they had trouble holding them there, something of the kind.

Q. Now, you know something about these storms along the beach?

A. I have saw some of them.

Q. And do they do some times very great damage?

A. Yes.

Q. You speak about a new inlet cutting through Brigantine Beach.

A. That was cut through in a gale of wind in 1861.

Q. How long did it take to cut it through, just one night?

A. Well, it was a little piece of beach and it cut through really in one day. There was a big bay back of that and when the high tide come the wind shifted off a severe northwest, it makes a sweep and it was only a gully when it cut it out.

Q. How large vessels would come in and out of that?

180 A. Not very large vessels.

Q. When did that cut through about?

A. 1861.

Q. Do you remember about that same time another inlet cut through the Absecon Beach down near Longport, in one night?

A. I don't know that, no, I couldn't testify to that.

Q. How much have you known these storms to cut in the beach?

either on Absecon Beach or on Brigantine Beach, a single storm there, how many feet have you known to be washed away?

A. That would depend on places; where high hills were up I have known it to cut in there quite a distance, probably ten or twenty feet, undermine the hill, then it would drop down.

Q. And you could see that when it was cut—you could see the hills fall in and see it wash out?

A. Yes, sir.

Q. Now, have you ever seen the storms undermine the trees on Absecon Beach?

A. I never did see it, I know it has been done.

The Court: What do you mean by Absecon Beach?

Mr. Bourgeois: That's Atlantic City.

Q. Have you seen the storms undermine the beach trees on Brigantine Beach and they fell in?

A. No, sir, there has not been any there.

Q. Hasn't been any trees there?

A. No in my days, there was at one time great cedar, but not that I have known about.

The Court: What is Brigantine Beach?

Mr. Bourgeois: Lies immediately north of Atlantic City. That's where Brigantine is.

181 Q. You say you do recall when you could stand on Brigantine Beach and call across to a man on Absecon Beach, across the inlet?

A. Have done it.

Q. And that was a common thing, wasn't it, when you wanted to go across?

A. No, it wasn't that—when my father kept a hotel very often I would ride down on a pony and call to old man Somers if there was any extra baggage so he could take care of it, he was the man done the carting from the train.

Q. At the present time what is the width of that inlet?

A. Pretty close up to a mile, three-quarters of a mile I should think sure—but there is middle ground in it—high middle ground in it. It is just about a mile from Peters Beach to the dock. That's pretty near the width of it now.

Q. Well, with relation to Sharp's house where these cedar trees on Absecon Beach are?

A. That was not Sharp's property, not Sharp's ground.

Q. Then did they extend down to the point of the beach?

A. Why no.

Q. When was that Mr. Smith?

A. I don't know, somewheres in the sixties when I was quite a boy. I was born in '53, I suppose I must have been about ten or twelve years old, something like that.

Q. Along about '55 and '56 maybe?

A. Might have been just about that, maybe just after the war was over.

Q. That's all.

JOAB HIGBEE, called and sworn on behalf of the defendant testified as follows:

Direct examination.

By Mr. Carr:

Q. Do you live in Atlantic City?

A. Live in Atlantic City, yes, sir.

Q. How old are you, Captain?

A. Very close to 62, I was born in '55, on the 11th day of November.

Q. How long have you lived at Atlantic City?

A. About thirty-eight years.

Q. You have charge of a sailing yacht down there?

A. Yes, sir.

Q. What is it, what is it called?

A. The Dreadnought.

Q. How long have you known the beach in the vicinity of New Hampshire Avenue and Vermont Avenue?

A. Well, about thirty-six years.

Q. When you first knew the beach how close was the water to the lighthouse, do you know?

A. Well, it come in the corners of the lighthouse yard on Vermont and Pacific Avenue.

Q. And was New Hampshire there at all?

A. New Hampshire was not below Atlantic Avenue.

Q. New Hampshire was not below Atlantic Avenue at all?

A. No, sir.

Q. Now, from the time you have known——

A. Not to the best of my recollection.

Q. From the time you have known the beach has it made or lost ground?

183 A. Why it has been a making, a making ever since this last forty years, that is more or less you know, some times wash away and come back again, but kept on making this last forty years.

Q. Well, the net result year by year has been gains, to gain more land, is that the way it went?

A. Yes, sir, they haven't lost any land there I don't think for this last twenty-five years.

Q. Did you ever know any time when there was more land there than there is now?

A. No, sir.

Q. Do you know which way the sand moves along the coast?

A. Well, I think the natural movement is southerly all the time.

Q. Has it been going on that way as long as you know it?

A. Makes up. Up at the Royal Palace, what we call southeasterly it works on down when a storm comes. When the wind comes it works on down, fills in down below, then it fills in up again.

Cross-examination.

By Mr. Bourgeois:

Q. You say you know the beach since 1881, thirty-six years ago?

A. Yes, sir.

Q. And where were you living before you came to Atlantic City?

A. Place called Leeds Point.

Q. You have been more or less familiar with the ocean and the beaches all your life?

A. In fact, all the time, ever since I was fourteen years of age I have lived on the ocean pretty much.

184 Q. And heavy storms make great inroads in them, don't they?

A. Yes, sir.

Q. Sometimes cut away 100 or 200 feet in one storm?

A. I have saw it cut away 50 or 75 feet in a storm. Sat there and looked at it and see the easterly tide, when a swell come in there, cut the sand, roll down there—it would roll down in twenty-five earloads to one sea.

Q. And the next swell came in, just took that out to sea and that's the last you ever saw it?

A. Washed it right down this way, to the southwards all the time.

Q. Where was that?

A. That's right at the foot of Madison, they call it Baltic Avenue in the old times.

Q. What used to be Baltic Avenue?

A. Yes.

Q. On Absecon Inlet?

A. Yes, sir.

Q. Right in the inlet. Then when the storm would subside and the wind would shift, and especially in the summer-time when we would have the southerly or westerly wind that sand would gradually come back again, wouldn't it?

A. Naturally works back again, sometimes takes three or four months though to get back what washed away in one night.

Q. Sometimes before you would get back what washed away in one night another storm would come and cut it back farther too?

A. Yes, sir.

Q. But if the storms would let it alone it gradually came back again?

A. Oh, yes, no doubt about that.

185 Q. Now, it is also true, isn't it Captain that when the beaches work south as you say and cut off to the north, and cut off of the north beach, for instance off of Brigantine Beach, or off of Absecon Beach, the lower end of it, that sand goes over and makes up on the beach below?

A. Well, not the north end of Brigantine wouldn't.

Q. No, the northerly beach loses the sand, and when it loses the sand, the other beach below makes the sand?

A. I have no doubt some of it comes across on Absecon Beach.

Q. Are you familiar with Great Egg Harbor Inlet more or less?

A. Well, more or less.

Q. Well, you remember how Longport has cut away about a half or one-third of a mile?

A. Yes, close to three-quarters.

Q. And do you remember how the Ocean City Beach is made so that in the Garden tract there is about 500 acres new land?

A. Yes, I think there is all of it.

Q. You also remember when this north end of Absecon Beach when the high waters came in to the lighthouse—you understand when it was cut in there; after a while that commenced to make out the beach commenced to make, and when it made there Brigantine lost?

A. Well, it has been a losing ever since.

Q. In other words as Mr. Smith says, we have got his land. Absecon has Brigantine sand over there?

A. Well, I couldn't say about that, most everybody thinks that's where it comes from. Don't see where it could get—they did not dig the channel any.

Q. That's right, Brigantine lost it and Absecon gained it?

186 A. That's what we always thought.

Q. Captain, let me show you a map.

A. I am not very familiar with map business.

Q. I want to ask you if you remember a slough that came in around the point of the beach in 1881? This is Pacific Avenue running along here (referring to P1 for identification). Now, if you look here you will find the high water mark of '81. It ran on along here away down in front of Massachusetts Avenue and then formed a sort of peninsula and came up around down along the beach again, making a slough in there from New Hampshire; extending down to Massachusetts Avenue. Do you remember when that condition existed there?

A. It was there when I went there.

Q. That's just the way it was, the way this map indicates?

A. Yes, come in down below there.

Q. Came up north to New Hampshire Avenue?

A. In fact it did not extend out, they made a slough in there five or six feet of water—it would go out again.

Q. Then finally the sand filled that up?

A. The sand filled that up.

Q. And that's what made the accretions to the beach at that point?

A. The sand filled it up from the outside washing over into it then the beach would come closer to the Boardwalk than what you could when the slough was there and after that got made up, it kept making up all the time after.

Q. In other words this bar or peninsula, that would have a tendency to break the force of the waves—finally the sand would stay in there and stick?

A. Sure.

Q. I think that's all.

187 Redirect examination.

By Mr. Carr:

Q. When you first saw the beach, I think you said at New Hampshire Avenue the water was nearly up to the lighthouse. Now, you have testified in regard to seeing large quantities of land carried away at a single storm. Your testimony in that regard—does it apply to the land at the foot of Vermont and New Hampshire Avenue or to land at other points?

A. Not me. I don't know anything about—I never was down around there in a full tide except at the foot of Baltic Avenue along the beach.

Q. You have never seen the washout that you describe at the foot of Vermont or New Hampshire Avenue?

A. No, sir.

Q. That's all.

Recross examination.

By Mr. Bourgeois:

Q. Just one other question I overlooked. Now, when these lands made up that was so gradual that you could not see from day to day, could you, whether it did make up?

A. No.

Q. But after two or three months you could see that it had made up?

A. Yes, sir.

188 JOSEPH C. HOFFMAN, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Hoffman you live in Atlantic City?

A. Yes, sir.

Q. How long have you known Atlantic City?

A. Well, my first appearance in Atlantic City was in 1872.

Q. How old a man are you Mr. Hoffman?

A. I am seventy.

Q. Are you familiar with the section of the beach at New Hampshire and Vermont Avenues?

A. Well, I am not very familiar with it as I have not been a constant resident of Atlantic City, I was only a visitor in those days.

Q. How long since you have been a resident of Atlantic City?

A. About 16 years now.

Q. Of course, you know the location of the lighthouse?

A. Yes.

Q. When you first saw the beach in 1872 can you give us any idea where the water was with relation to the lighthouse?

A. I know the water was right almost around the lighthouse.

Q. Almost up to the lighthouse?

A. Almost around it, it was up to the door.

Q. Now, have you seen it from time to time since?

A. Oh, yes, yes, sir.

Q. Made out considerably since?

189 A. Yes, made out several squares.

Q. Did you ever have any knowledge of its being further than it is now?

A. No, sir.

Q. It is out now as far as it has ever been, as far as you know?

A. To my recollection, yes.

Cross-examination.

By Mr. Bourgeois:

Q. You have no reason to doubt that it was once further than that, have you?

A. No, sir.

Q. That's all.

Redirect examination.

By Mr. Carr:

Q. Won't you explain your last answer, you were asked if you had any reason to doubt that it was out further at one time, you haven't any information it was out further?

A. I have no information with regard to it.

Q. Did you understand the question in that sense?

A. Hardly.

The Court: What you meant to testify was that you would not swear it was not out further at some other time?

The Witness: That's the idea.

Mr. Bourgeois: That's what I meant to say, he had no reason to doubt it, because he knew nothing about it.

190 WILLIAM ARTHUR URQUHART, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Carr:

Q. How old are you?

A. 74 Friday.

Q. And where do you live?

A. I live in Atlantic City.

Q. How long have you known the beach front of Atlantic City?

A. Since 1867.

Q. Did you do any work on the Government jetties?

A. Yes, sir.

Q. Do you know when they were put out?

A. The railroad pier that Mr. Taxis put out was put out in the winter of '75 and '76.

Q. And then were there some jetties put out near the lighthouse?

A. The Government jetties were put out in the winter of '77.

Q. Did you work on both of those jetties?

A. Yes, sir.

Q. Now, when you first knew the beach in the neighborhood of Vermont Avenue and New Hampshire Avenue where did the water come with reference to the lighthouse?

A. Well, Vermont Avenue you know in those days there wasn't any Vermont Avenue. There was nothing beyond the bend of the railroad.

Q. By the bend in the railroad do you mean the same railroad that makes the turn running from Rhode Island Avenue and—

191 A. Comes right down here to New Hampshire Avenue and the railroad company ran a "Y" out here to put their pier in, a little branch road.

The Court: So there wasn't any New Hampshire south of the railroad, referring to D13?

A. No, sir, there wasn't any Vermont Avenue. Nothing laid out, it was all meadow lots, of course there was lines there but there was no streets or nothing.

Q. Now, do you know where the high water mark came along there about that time?

A. No, sir, I couldn't tell you about that, every storm tide it shifted.

Q. But the ordinary tides, how close would they come to the lighthouse?

A. I suppose in them days it would come within 200 feet, maybe a little more or a little less.

Q. And did this Government jetty start right off from the railroad tracks?

A. Yes, sir, they ran a little branch out there so they could handle their stuff.

Q. Were the railroad tracks close to the water?

A. They laid a track, they ran that jetty out 300 feet, they used a land seine, drove piles with a hammer and ran the cars with the stone and brush.

Q. Were the permanent railroad tracks close to the water's edge at that time?

A. No—well, I suppose it was maybe 300 feet, that is up there where they ran from New Hampshire Avenue out.

Q. You mean the jetty was 300 feet long?

A. The jetty was but I mean where they started the branch road to the low water mark, where they first started **their cribs**.

192 Q. Well, I don't quite understand it, do you mean that the railroad at this point was about 300 feet inside of the high water mark?

A. Yes, sir.

Q. And then they ran a branch or spur of the railroad and built it right out on the jetty, was that it?

A. Ran the jetty and the railroad right on top of it.

Q. Now, since the time the jetties were built has the beach made or lost?

A. Well, for the first two or three years after they were made they lost a little, then after that they began to pick up.

Q. Has it been making or losing since?

A. Well, up until I left the beach in '81 why it was losing, I left the service in '81, and from that time I never took no particular notice of it.

Q. Were you in the life saving station there?

A. Yes, in 1879, left in '81.

Q. Did you ever know of a time when the beach was out any further than it is now?

A. Well, I don't know whether you could call it the beach or not, but there used to be a whole lot of flats there on a mean low tide.

Q. No, I mean the high water mark?

A. No, sir.

Q. High water mark is out now as far as you have ever known it to be?

A. Oh, it must be out further now, you know because that beach is made up a little bit all down below.

193 Cross-examination.

By Mr. Bourgeois:

Q. How far did you patrol—you patrolled south I suppose, didn't you?

A. Sir?

Q. You patrolled in the life saving station south from the lighthouse?

A. Yes, sir.

Q. How far down did you go?

A. Well, we could go about two miles, I think.

Q. Now that was in 1879 to '81?

A. Yes, sir.

Q. At that time the high water line of the entire ocean front of Atlantic City was very much nearer to Pacific Avenue than it is today, wasn't it?

A. Well, in a bad storm tide when a man had to go out nights sometimes we used to have to go through the lighthouse yard over to get on to Pacific Avenue.

Q. Which yard, the lighthouse yard?

A. Yes, sir, other times we had our long boots on we would go down around the corner of the fence and I suppose the water would come about up to your knee.

Q. What I want to find out is this, the high water mark along the Atlantic City front was then much nearer to Pacific Avenue than it is now?

A. Well, now see the beach that's made up there now.

Q. That's what I mean, at Pacific the beach has made up about 1,200 or 1,300 feet, hasn't it?

A. Yes, sir. We used to patrol the beach down there you know. Sometimes the high water mark would come pretty close to Pacific Avenue.

194 Q. And the Seaside House was at that time only about 150 feet from Pacific Avenue?

A. Yes, sir.

Q. Was it then called the Seaside House when Evans had it?

A. I think it was, yes, sir.

Q. And when you got down to Missouri Avenue how far was it to — from the high water mark from Pacific?

A. I can not tell you, you are getting beyond me now.

Q. Missouri Avenue wasn't laid out there?

A. I always located on the upper end of town.

Q. And all the inhabitants lived pretty much from Virginia to the inlet or Pacific Avenue?

A. Yes, there wasn't in them days—there wasn't anything below Arkansas Avenue at all only a sheet of brush clean down to the bend of the beach.

Q. You were in the life saving station from '79 to '81?

A. Yes, sir.

Q. You were in Atlantic City in '78?

A. Yes, sir.

Q. Do you remember of a very, very severe storm that occurred in '78 cutting in the beach terribly, in the fall of '78?

A. I don't know that I remember that storm particularly, we had so many of them there in those days.

Q. And they all cut in would they?

A. Yes, the beach would change every storm, every gale of wind.

Q. I suppose you have seen these storms cut in the sand hills and the sand hills tumble in and go out?

A. Yes, sir, I have seen it cut away Brigantine, take it out
195 on the shoals, the hard northwester would shift the sands out on the shoals. Another wind would come and shift it over on the beach, that's the way Brigantine is, down where the Marlborough-Blenheim is.

Q. It took two processes to land the soil from Mr. Smith's home over to Atlantic City, and I expect Mr. Urquhart you have seen those trees up along the inlet in big storms when they have fallen in too?

A. There used to be a bunch of cedars at Vermont that went down, every bit of it went down.

Q. And when the land made up it did not come back in acres but it just came back gradually?

A. It went to the southward.

Q. I don't mean that, but I mean finally the beach commenced to

make up, the point of the beach there commenced to make up, the sand commenced to gather, that gathered gradually?

A. It flattened out you know.

Q. You couldn't tell from day to day how much it gathered?

A. No, sir.

Q. But after some months had passed you could see that it had gathered?

A. Gradually until another storm cut in, and then gradually regained and cut in again with the storm.

— But the whole result has been that the land has gradually gone out?

A. Has shifted and gone to the southward.

Q. But I mean on the point of the beach, of Absecon Beach has gradually gained towards the ocean, the ocean has receded in other words?

A. Yes, it has cut out that way you know and gone to the southward. That piece of railroad from the inlet up to where Vermont Avenue used to be ain't changed a bit, it is just as it was in the old days. The railroad company ain't changed it.

196 Q. They have a lot of stone jetties and things of that sort?

A. Well, they put a lot there but they have all settled away and that's never cut away there.

Q. Then your opinion as I gather is that the land that has made around New Hampshire and Vermont really came from Brigantine?

A. Yes, it comes to the present day because all our cut is over on the east side of the bar where the channel tide comes down and hits it, and the northeast makes it up and the next tide cuts it away and sends it over.

Redirect examination.

By Mr. Carr:

Q. Just a minute, where you saw the trees falling in and the land cut away by storms, was that at the foot of Vermont Avenue or New Hampshire Avenue?

A. Well, it was to the east side of Vermont Avenue.

Q. East of Vermont?

A. And north side of Atlantic Avenue.

Q. But in this section down at the end of Vermont Avenue you do not see the trees being washed away and the——

A. Oh, no.

Q. You never saw those big washouts down there?

A. Yes, if you were down the beach along there you could notice the tide because a cedar tree ain't like anything else, it has so many roots it takes a long while to undermine it.

Q. Well, were there any cedar trees below the lighthouse and towards the beach?

A. Southwards of the lighthouse?

197 Q. Yes.

A. No, sir.

Q. There wasn't anything there?

A. Nothing there.

Q. And in between Rhode Island and Vermont there wasn't anything there, was there?

A. What do you mean?

Q. South of the lighthouse between Rhode Island and Vermont south of the lighthouse?

A. No, sir.

Q. Between Vermont and New Hampshire?

A. No, sir.

Q. So there weren't any cedar trees washed away in that section?

A. In that section there, there wasn't any in my recollection.

Q. And the land that made up made up gradually and was flat was it?

A. Yes, sir.

Q. You didn't see any large amount of earth being carried away there at one storm?

A. Them bars on the low water would fall there according to the rise and fall of the tide, and then on flood tide they would cover up, and on the flood tide, in a big tide when we would come to launch our lifeboat if we were called away we could shove the boat right into the water without using any carriage to cart it or anything.

Q. That's all.

198 Cross-examination.

By Mr. Bourgeois:

Q. Mr. Urquhart, it was not an uncommon thing for a storm to cut in this flat beach, where it was flat a hundred or a couple of hundred feet?

A. On Vermont Avenue?

Q. Well, wherever it was flat. He says the beach was flat—I say—

Mr. Carr: I mean as far as Vermont and New Hampshire.

Q. Well, say Vermont.

A. Well, south of Vermont there was a big flat out there.

Q. Yes, and it was nothing uncommon for those storms to cut those flats away in?

A. No, there is a shoal there yet.

Q. It was easier to cut the flats in than it was the high land, wasn't it, I mean the ocean in a storm would cut more of the flats in than it would the high land?

A. Yes, it would cut it away.

Q. And make up again?

A. Certainly.

Q. Cut away and make up.

Redirect examination.

By Mr. Carr:

Q. Mr. Urquhart, I am talking about the land, the fast land—when I am speaking about its being washed away, did you ever see the fast land washed away in great big pieces down at the 199 foot of Rhode Island, Vermont and New Hampshire?

A. No. Atlantic Avenue was graded up to the corner of the lighthouse and outside to the eastward of that there was nothing—well that never went away you know because it was maybe a couple of hundred feet to the low water mark.

Q. Yes, where I am indicating here on Exhibit D13 south of Pacific Avenue and south of the lighthouse—between those points you did not see those washouts, those large quantities of land at one time?

A. No, sir, that was all beach, all sand beach.

JAMES MILLS, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Mills, do you live in Atlantic City?

A. Yes, sir, I have lived in Atlantic City ever since I have been a boy thirteen years old.

Q. I think you are the captain of the yacht M. S. Quay?

A. Yes, sir.

Q. Is that a boat that takes out pleasure parties from the inlet?

A. Sir?

Q. That takes out pleasure parties from the inlet?

A. Yes, sir, every day, sir.

Q. And how long have you known the lighthouse section of Atlantic City?

200 A. Well, I have been knowing it about ever since I have been a boy, thirteen years old.

Q. How long have you been sailing in and out the inlet there?

A. Ever since I have been a boy eight or nine years old.

The Court: How old are you?

The Witness: Fifty-seven.

Q. Do you recall the building of the Government jetties?

A. Yes, sir.

Q. In the lighthouse section?

A. Yes, sir.

Q. Did you work on them?

A. No, sir.

Q. There were two sets of jetties built were there not?

A. Yes, sir.

Q. Now, do you know about when they were built?

A. Oh, somewheres about forty or forty-one years ago.

Q. Now, when you first knew the beach there where did the water come with relation to the lighthouse?

A. Well, I tell you, if you take me there, from the foot of Baltic Avenue down to the foot of Massachusetts Avenue I will tell you.

Q. I would like to take you there but I cannot.

A. Well, I will give you the best I know.

Q. You tell me in your own way.

A. Well, when I was a boy about thirteen years old, the foot of Baltic Avenue, the high water mark was about like it is now, 201 and I remember two or three more of us dug caves down in the hills, put stoves in there and made playhouses out of them. Now, how long a time that was, I guess about forty-eight or something like that it commenced to wash in, it washed in, clean up to the railroad tracks, what they call the mule stable that was between Baltic and Arctic Avenue, up to what they call New Hampshire Avenue now. There was no New Hampshire Avenue at that time and from there it went down to the lighthouse yard on the northeast end of it, well not the northeast end but the east end of it, and I have had to throw the sand up there to keep it from going into the lighthouse yard.

Q. Now, was there any Vermont Avenue south of Atlantic Avenue at that time?

A. No, sir.

Q. Was there any New Hampshire Avenue north of Atlantic Avenue at that time?

A. No, sir.

Q. Now, from that point, has the beach at that point made or lost?

A. Well, from the foot of Baltic Avenue down to Royal Palace, the foot of Pacific Avenue I have seen the time since that time that has washed away and filled in in certain places, you understand, then make out again, but from there on the Heinz's pier the beach has been making for the last forty-one years and is further now than it ever was.

Q. Now will you tell us where Heinz's pier is, the foot of what street?

A. Massachusetts.

Q. And that's beyond Rhode Island Avenue?

A. Yes, sir, Rhode Island Avenue you understand is to the eastward of it.

Q. Have you ever known a time when the high water mark was not further than it is now at the foot of Rhode Island Avenue 202 and New Hampshire Avenue?

A. No, never in my life.

Q. Have you ever heard of its being out any further?

A. No, sir.

Q. Do you remember the house that Capt. Timothy Parker built right across here?

A. Well, I remember the time he built the house, but I don't know anything about these new maps. I am here to answer your

questions on the property, I don't know anything at all about the new maps.

Q. You know where the life saving station is?

A. Yes, sir.

Q. Well, Tim Parker's house is right across from the life saving station?

A. I remember that.

Q. Do you remember whether it was on piling or not?

A. That I could not say, I never took interest enough to see it.

Q. Well, do you know where the water came with reference to Tim Parker's house?

A. No, sir, I don't.

Cross-examination.

By Mr. Bourgeois:

Q. Captain, the timber that grew on Absecon Beach was red cedar wasn't it?

A. Yes, sir, red cedars, hollies, briars and everything.

Q. And it was the common thing to set houses on red cedar piling wasn't it?

A. They did.

203 Q. And red cedar was a good deal easier to get down there than brick?

A. Well, there wasn't so many of them till you got down to the beach.

Q. There were plenty on Absecon Beach?

A. Down towards Longport, yes.

Q. Well, there were some, weren't there, up at Vermont Avenue?

A. Well, I will tell you how many cedars at eVrmont Avenue, tell you where they started from.

Q. How many were there?

A. Well, I tell you, there was two hills you understand. One ran from Vermont and Railroad Avenue and the other ran from Vermont and Atlantic down what they call Sharp's — Mr. — was talking about the hills washing away and the cedar trees falling. I stood there many a day and seen them falling myself.

Q. That was during severe storms you would see them fall down?

A. Why, yes, sir, a northeast storm would cut them down, yes sir.

Q. And of course, would cut the other part of the beach as well, didn't just stop right there?

A. Washed it away, yes, sir.

Q. I think that's all, Captain.

Mr. Carr: I think we will resume the regular order unless there are some more ancient witnesses who are anxious to get away.

Mr. Bourgeois: I don't think it makes a bit of difference because if we put our witnesses on and there is anything to rebut that—

204 Mr. Carr: I would like to retain them because something may develop in the testimony that some of these witnesses could throw light on if they knew of it.

These were intended to be in an anticipatory rebuttal.

Defendant rests.

CHARLES F. ATKIN, called and sworn on behalf of plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. McCarter:

Q. Mr. Atkins, are you connected with the secretary of state's office?

A. I am.

Q. Does the office of the secretary of state contain a series of maps filed by the riparian commission?

A. Yes, sir.

Q. Have you produced at our request a map, I think it is No. 16?

A. No apparent numbering on it.

Q. This if from the——

A. From the files of the office.

Mr. Carr: Are you going to offer this?

Mr. McCarter: Yes, sir.

Mr. Carr: I make the same objection that Mr. McCarter made to the use of ours. This is a lithographed copy of a map. It is not explained in any way. There is no opportunity to cross-
205 examine the parties who made it, nor is there the story of how it came into being, and it does not appear even that this is an official map except that the riparian commission has adopted and approved of a lithographed map prepared by someone else, it does not even appear that it was done by the engineers of that board. I am quite willing it shall go in if ours goes in, but I don't think there is any different situation.

The Court: For what purpose is it offered?

Mr. McCarter: To show the position of high and low water mark 1552, and to show that the gentleman here yesterday was mistaken.

My understanding of the situation your Honor is this. I understand that official maps made pursuant to law, filed in public places, such as the office of the secretary of state by bodies authorized as this body was to make and file such maps become matters which don't need proof and because they are matters affecting public interest prove themselves. Now the difference between this map and the one that was before us yesterday is this. This is the original map made pursuant to law filed in the place where it is required by law to be filed and produced by the custodian. Yesterday the thing that they produced was said to be a paper on file in the geodetic survey. There was not any authority shown for the making of a geodetic survey, there wasn't any authority shown for the making of such a map and it did not appear that this was part of that and there was nobody produced that gave it any authenticity. It was

a mere scrap of paper from Washington. Now I have always understood the law to be that official documents made pursuant to law and kept in the regular place prove themselves and are admissible without any proof and they affect matters of public interest. This is an old map, and insofar as it shows anything that may bear on this issue is I think both relevant and competent. We therefore offer it.

The Court: I don't think it proves itself except as to matters that the law required it to show. Let me see the act under which it was made (after reference to the act). I will reserve it, I want to look at the question. I will look at it during recess. We will take a recess at this time.

Recess.

Afternoon Session.

The Court: The general rule as stated by Wigmore, would seem to indicate that the map that is now offered, the riparian commissioners' map and all of the statements therein contained insofar as they were within the authority conferred upon the riparian commissioners by the statute—I am inclined to take the map, that is receive it in evidence, but I will not attempt to say at this time without an examination of the statute under the authority of which the map was made, to what extent it is evidence or for what purposes it may be used as evidence. That is to say whether it can be used for evidence in any other respect than as showing the then water line and the exterior boundary and things of that kind. Now, that leads me back to the condition that confronted Mr. Carr yesterday. I have not any doubt without examining the statute, that the map which he offered to produce, the geodetic survey was made by authority of law and that for some purposes it is admissible under the rule I have just been talking about, that I have just been discussing, and I think I will reserve those two maps in evidence with the same limitation exactly as I received the secretary of state's map unless the objection is—which I am not at all clear about—that it does not appear to have been produced from the files of the authority in whose custody it was in accordance with the provisions of the statute under which it was made. If it should later appear that there was no such statute authorizing its making, why then, of course, the map becomes of no account whatsoever, until there has been some proof—

Mr. Carr: I assume that proof in the form of an exhibition of the statute which authorized the making of such map, if there be such a statute will be all that is required.

The Court: That is just the point. I do not think it is necessary in this court to prove a statute, this court take judicial notice of the laws of Congress and also of the laws of the several states, therefore it is not necessary in order to make these maps admissible as evidence that you should also introduce the statute, and consequently I have got to take them now and later when I have an opportunity to examine the statute, or my attention is directed to them, determine the extent to which these maps are admissible, and the extent to

which they are evidence. Of course, if the objection is as to the defendant's geodetic survey map that they are not proven to have come from the custody of the proper official to whose custody they were committed by law, then I cannot admit them.

208 Mr. Carr: Mr. Bourgeois and Mr. McCarter if the objection is as to the authenticity of this copy I will supply the proper certificate of the department.

Mr. McCarter: I don't think we care anything about that.

Mr. Carr: I did not suppose you did.

Mr. McCarter: No, I have felt and still feel that there is nothing on the map itself that would indicate it has any official position whatever. It simply says that it is taken from the files of the geodetic survey. There may be thousands of things on the files of the geodetic survey that are not papers that the geodetic survey were authorized to make. In other words I don't understand that this is a part of the well known geodetic survey which was undoubtedly an authorized piece of work. It simply says this is taken from the files of the geodetic survey, and if that could be substantiated in any way I shall be content, the fact that you have not got a certified copy, we do not make a point of that.

The Court: Why can we not have as far as this is concerned a statement from the official custodian of those maps as to exactly what they are?

Mr. McCarter: That will be satisfactory.

The Court: And we will hold the receipt of them in abeyance until that is produced. Now this map has been received in evidence, received and marked Exhibit P2.

209 Mr. McCarter: Suppose I have a tracing made and have that marked, later I would like an opportunity to be heard on the evidential effect.

The Court: Depends very much on the statute. I do not want to stop now to examine the statute, it would take probably the rest of the day and keep us here for no purpose.

LEWIS ROWAND, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Bourgeois:

Q. Mr. Rowand you live where?

A. Haddonfield.

Q. What is your age?

A. Eighty-one past.

Q. And by profession you are what?

A. I was a surveyor, I am about nothing now.

Q. I show you a book of notes and ask you if you have seen it before and if you can tell me what it is?

A. Yes, that's a note book of my father, notes on Absecon Beach.

Q. And who is your father, what was he?

A. Jacob L. Rowand, surveyor.

Q. Do you know when the notes were made with relation to Absecon Beach?

A. In October, 1862.

Q. Did you have anything to do with the taking of those notes, I mean the measurements or anything of that sort?

A. I was there assisting my father. I was sixteen years
210 old at that time and I carried the rod. I was something of a surveyor myself even then.

Q. I will ask you to step around this side, but not yet, just wait a second. I show you a map and ask you if you know what that map is?

A. This is what we would call, or my father called a rough map of Absecon Beach, that is two or three years prior to the dedication of—incorporation of Atlantic City. These are the lines which he ran showing the lands to be conveyed, intended to be conveyed by the different owners, one-half of their beach lands to the Camden Atlantic Railroad Company. The Camden Atlantic Railroad Company found that it was unable to take title to those lands for the reason that their charter prohibited them from holding more than four acres at either terminal of the road, therefore these lands were conveyed to Doughty and Jonathan Pitney during the formation of the Camden Atlantic Land Co.

Q. In other words these owners of real estate on Absecon Beach had entered into an agreement with the Camden Atlantic Railroad Company to deed half of their land, if the company would put a road in there?

A. Yes, of their beach lands. These were meadows over here, we called this the beach land, we called those the beach lands, from the edge of the meadows out to the ocean.

Q. Now, Mr. Rowand you will notice two lines, one along the waves, dotted line, it is not marked on that map, do you remember what line that is?

A. I think that is called surf line. I could tell by the book better. Here is the mark. That's the surf line, here is the mark, range of sand hills, that somebody has put there.

Q. Now, the range of sand hills, what does that indicate,
211 if anything, with regard to the high water of the Atlantic Ocean?

A. That was a storm tide mark where excessive storm tides would overlap the high water mark and come in over the flat ground to the base of the sand hills.

Q. Now, where was the high water with relation to what you call the surf, if you can tell me?

A. Well, from two to three hundred feet,—surf, you mean low water?

Q. From low water up to high water I mean, how much?

A. From two to three hundred feet. That is daily high water, not storm.

Q. Now, have you ever been in any litigation in our state in which this map and this storm tide line came in question?

A. Yes, several.

Q. What was it?

A. I cannot remember the title of the cases. One was the Haddon Hall.

Q. That was a suit between whom?

A. Lippincott and the other was Seaside, Charles Evans at that time.

Q. That was a suit between whom?

A. Camden Atlantic Land Company to claim this accretion.

Q. In other words the land company had made a conveyance of land to the storm tide line?

A. The land company had made a conveyance of land to the storm tide line in those deeds.

Q. And then when the accretions made up the land company claimed them?

A. Yes.

Q. That was the suit, wasn't it, of Camden Atlantic Land Company against Lippincott?

212 A. That was the Camden Atlantic Land Company against Lippincott, and the other one against—

Q. Charles Evans.

A. Evans. The accretion there in front of Haddon Hall, Mr. Browning did not want to include the Boardwalk, I think we measured out about 1,300 or 1,400 feet from the original storm tide mark.

Q. And do you recall the result of that suit?

A. I think—this is only by hearsay—

The Court: Well, why should we take his version of what the result was?

Mr. Bourgeois: The case is reported.

Q. Now, Mr. Rowand, I notice there is no street system on that map?

A. No.

Q. Do you know who laid down the street system on the map that your father made?

A. Only that I have heard Roger B. Osborne, the engineer of the Camden Atlantic Railroad swore that he or his assistants put those streets upon what you call the dedication map.

Q. Is that dedication map the blue print of which is on the Judge's desk, D9, a reproduction of the map that is now before you insofar as the map is concerned, except only the street system?

A. Yes, sir, there are the same little crosses here in some of these property lines.

The Court: This one he made on Christmas Day, 1852, and that one in October.

A. Yes, father made this as a rough map and it was submitted.

213 Mr. Bourgeois: Well, your Honor please, this was when the survey was made, when they started in to do the work, October 19, isn't it?

The Witness: I think so, just says October '52 sometime, October 19th or 20th.

Q. Now, do you know of your own knowledge if there was land above the high water mark beyond this line of sand hills at the— well the line of land of Chalkley Leeds, when the survey was made in '52?

A. In other words do you mean whether there was a line of sand hills here?

Q. No, whether there were flats along there before you came to high water mark.

A. Certainly between where there were sand hills and the high water mark, flat lands.

The Court: What is the distinction you make between the line of the sand hills and high water are they the same?

The Witness: No, the line of sand hills was the mark of storm tide, because the storm could not cut any further than the sand hill, could not come any further.

The Court: The tide never came up further than the sand hills in the storm?

The Witness: No.

The Court: Now where was the high water mark?

The Witness: Farther out.

The Court: How far?

214 The Witness: Well, I should say it would vary from two to three hundred feet up to five or six hundred feet.

The Court: Out from the sand hills?

The Witness: Yes, sir, from the sand hills out to the high water mark.

Mr. Bourgeois: Oh, I understood.

The Witness: Or in other words between storm tide mark and high water mark it would be a variable distance.

The Court: Now then, how far was the low water mark from the high water mark?

The Witness: Two to three hundred feet.

The Court: Still farther out?

The Witness: Yes, depends upon the slope of the ground, of course, up towards the point of the beach very apt to be more precipitate slope.

The Court: That map does not show the high water mark or the low water mark, does it?

The Witness: Shows the low water mark.

The Court: And that is what, the beginning of those lines?

The Witness: Here?

The Court: That is the beginning of the lines?

215 The Witness: Yes, those lines were intended to represent water.

The Court: But it does not show the high water mark?

The Witness: No, sir, high water mark is not taken in at all, it was the low water mark and the storm tide mark.

Q. Now, Mr. Rowand, I spoke to you a moment ago of Chalkley Leeds' land, can you tell me how that is indicated on the map? Give

the number acres. How many acres in that Chalkley Leeds tract which I spoke of a moment ago?

A. 34.60 acres, this is Barton Leeds.

Mr. McCarter: Where is that with reference to New Hampshire Avenue, does that appear on the other map?

Q. Now, Mr. Rowand, will you turn to this map please, and let us see where that comes. I ask you whether or not the part marked Doughty and Pitney, 34.60 acres tract is the same tract?

A. Yes.

Q. And the easterly line of that tract intersects the low water mark of the Atlantic Ocean?

A. Yes, sir.

Q. About a little more than half way between New Hampshire and Maine Avenue, doesn't it?

A. Yes, sir, about half way between where Maine Avenue would strike.

The Court: Let me ask you one point. On this map, Exhibit D9, which I understand is a replica of what you are referring to, is a piece of ground marked strand. What does that mean?

The Witness: That is beach and flat sand between the base of the sand hills and high water mark.

The Court: High water or low water mark?

The Witness: Well, might take it all the way across if you choose to call it so.

The Court: It would be low water, wouldn't it?

The Witness: Yes, because high water is not shown there. You speak of the beach there as strand.

(Map marked in evidence, Exhibit P3.)

Cross-examination.

By Mr. Carr:

Q. Mr. Rowand, Exhibit P3 in its outline, is it the same as the Atlantic City dedication map, so called Exhibit D9?

A. Yes. There may be a few alterations here in some of these curved lines is all, but the general outline of the thing is the same.

Q. Now the survey made by your father did not include the street work or any of the interior lines did it?

A. Nothing at all, that was done afterwards.

Q. And not done by your father?

A. Not done by him.

Q. Nor by you?

A. No, sir.

217 Q. How long were you down there on the ground with your father when this work was done?

A. A week or two.

Q. You were a boy sixteen?

A. Yes, sir.

Q. I don't suppose you were a surveyor, were you?

A. Well, I had done a little, I was brought right up from infancy in it.

Q. You were learning it?

A. Yes, sir.

Q. And the actual field notes were made by your father, calculations made by your father. You had no part in them except the mere carrying of the rod, is that true?

A. That's all, yes.

The Court: For whom did your father make the survey?

The Witness: Originally intended for the Camden Atlantic Railroad Company, they could not take title to the land, therefore the conveyances were made by these parties to Doughty and Pitney, directors of the Camden Atlantic Railroad Company.

The Court: Yes, I understand, but it was made by him for them, for the Camden——

The Witness: For the railroad company virtually and then it was discovered that they could not take title to the land and it was made to Doughty and Pitney to hold until the Camden Atlantic Land Company had been formed. In the meantime it went through the hands of Isaac S. Waterman who furnished the money.

218 Q. Now, do you know what became of the completed map that your father made?

A. Well, I have seen it in Trenton, in Camden, and I understand, I remember Mr. Abraham Browning impounded it in the Chancellor's Court in this city, it got away from the court house and got into Atlantic City and Kit Ray the clerk at that time discovered it in some man's drawer in Atlantic City. Abraham Browning got hold of it, impounded it, and it has gone back to Mays Landing, I suppose it is there yet.

Q. This blue print which is a blue print made from the tracing of the map recorded in Atlantic County as an original map shows that the original was recorded in 1882. Was it in your or your father's custody up until that time?

A. No, sir, it was not, I think it passed out of his custody in 1852, at the time he made that completed map, I never saw it in his custody afterwards.

Q. And he had nothing to do after that with the lay out of the streets?

A. Nothing at all.

Q. Do you know how long that was done after 1852?

A. I do not. I know there was a good deal of difficulty there with the landowners, they were not willing to give much land for the streets, and finally they decided upon this plan and cross streets 50 feet and I think Pacific Avenue 60 and Atlantic Avenue 100. They were very careful of those sand hills, did not want to give them away, but that was not done by my father, any of the street work.

The Court: You speak of the sand hills, how high were they?

219 The Witness: They were all heights, as high as thirty or forty feet, some of them above the level of the water, sand hills, cedar trees, briars, holly trees, everything on them.

Q. Were there sand hills all along the beach, all the way down to this Steelman Leeds' line—what direction is this?

A. About southwest.

Q. On the southwest part of the land?

A. These sand hills ended somewhere here over towards the meadows.

Q. Well now, look at the blue print map a moment, were there sand hills all the way down opposite the Doughty and Pitney 99.56 acres shown on Exhibit D9, were there sand hills all the way down to here?

A. Yes, all the way down as far as these lands went as far as what is now Cincinnati Avenue.

The Court: Were the sand hills all the way to the inlet?

The Witness: Yes, except one place here they came in around a bend towards the meadows and those would be covered by storm tides. They went to the base of the sand hills every time.

Q. Does your map contain the word "Strand" on it?

A. No, not the rough map, it does not.

Q. Who put the word "Strand" on the map, do you know?

A. Which map do you mean?

Q. Exhibit D9?

A. Well, I suppose my father did, I can not remember all those details.

220 Q. Can you recognize his marking in any way?

A. Well, he would not make that, no; he hasn't written it that way, it may have been written over by somebody else.

Q. No, this is an exact copy of the map on file?

A. I understand this is a copy of a tracing. The man that made the tracing could put his own handwriting on it.

Mr. Ashmead: It is a copy of a tracing.

A. Well, that's a very good representation of my father's signature. He was a good writer Samuel Rowand, December 1852, but when a man makes a tracing he can not always follow the handwriting of the original.

Q. Now, your map does not have the word strand on covering the—

A. This map you mean (P3)?

Q. Yes, covering the Doughty and Pitney 34.60 acres does it?

A. No, sir.

Q. I call your attention to a curved line inside of line marked "Line of outside sand hills" and ask you if you can tell what that line is?

A. No, I can not, I saw that, but I don't know what it is, it does not begin with the line of the outside said hills, neither does it end there.

The Court: Does not appear on the map P3 either does it?

Q. Assuming that it appears——

The Court: No, it does not, he said.

Q. Assuming that it appears upon the filed map in Atlantic County could you say whether or not it was a part of your father's original work or someone else's?

A. I could not.

Q. You have seen that map a number of times, haven't you?

A. Yes, sir.

Q. Do you know whether or not that inside curved line appears upon it?

A. No, I do not, it is not a regular curved line there by any means.

Q. Not an irregular curve either.

A. It is curved there and there it is pretty near straight, it looks as if somebody slipped the pen.

Q. What line was chosen of the sand hills, the base of the hills?

A. Generally the summit. We placed a stick on top of wherever these cross lines would cross the sand hills. We put a stick there for reference. The reason we did that was if it was put down below it would very likely be buried up or washed away.

Q. What was the significance of indicating the line of outside sand hills?

A. Only a memorandum which a surveyor would make to fix his points which he could refer to at any time.

Q. Why would he perpetuate it on the official map?

A. I don't know.

Q. Do you know of any other seashore map in which the line of the outside sand hills was indicated?

A. I don't remember any, I have seen a number of maps of Atlantic City. Some of them have them on, some have not.

Q. You mean they are the lithograph copies of this map?

222 A. No, not lithograph copies from that.

Q. But made up from the data on this map?

A. I suppose so, I can not tell where they got it.

Q. Was this map your father made, the first one of what is now Atlantic City?

A. These lands with the exception of the Chamberlain tract here belonged to Jeremiah Leeds. It was divided up by commissioners I think, in 1840. Now that's the first map I ever saw.

Q. That is the commissioners' map?

A. That is the commissioners' map, yes, sir, a very large one of it somewhere, or gave it to the railroad.

Mr. Bourgeois: Is that one continuous map or several parcels.

The Witness: One continuous map made by John Clement.

Q. Now the space indicated as strand extends to the low water mark, as one boundary does it not?

A. I should say so yes, sir.

Q. And the other boundary is undefined, is that your position?

A. I do not quite understand you, what do you mean the other boundary, the sand hills?

Q. One boundary of the strand is the low water mark, is that correct?

A. Yes.

Q. Then in between that and the line of the outside sand hills is the line of ordinary high tide, isn't that true?

A. No, the ordinary high tide would not reach the base of the sand hills.

223 The Court: No, no, he says between the base of the sand hills and the low water mark is the ordinary high tide mark.

The Witness: No, sir.

The Court: You don't understand.

Mr. Bourgeois: Somewhere between.

The Witness: Oh, it is somewhere between the low water mark and the base of the sand hills.

Mr. Bourgeois: Is the ordinary high water mark.

The Witness: Is the ordinary daily high water mark.

Q. What is the point of defining strand as meaning the point between the line of the outside sand hills and the low water mark, what is the object of defining that territory?

A. No more than the object of calling these salt meadows. That was because that was its name, they called it the strand.

Q. Who called it the strand?

A. Everybody today.

Q. No, at that time?

A. Oh, I don't remember who called it then. There wasn't anybody much there to call it.

Q. At that time the work was all done prior to the laying out of the streets and the word strand was not placed upon the original map Exhibit P3, was it?

A. No, sir.

Q. Do you know how it came to be placed on Exhibit D9?

224 A. My father made that map, experimental map or whatever you please. The work was done and then when he come to make this map he put the additional work on. He did not put it all on here because he did not know but he would have to duplicate that work.

Q. I understand that, but at the time he made up his completed map from Exhibit P3 there were no streets on it?

A. No.

Q. There were no marks on it other than the names of the property owners and all their property lines, were there?

A. None.

Q. Well do you know why on that map he marked the word strand?

Mr. Bourgeois: Well, Mr. Carr, it has not appeared yet that he did mark the word strand.

The Witness: I don't know.

The Court: Let me ask you this.

The Witness: Show me the original paper I will tell you whether he put it there or not.

The Court: On this Exhibit P3 which is the original map you see the words "Line of sand hills and beach," in whose handwriting is that?

The Witness: My father's handwriting "Line of sand hills and beach" here it comes around here.

225 The Court: Was that line made by him?

The Witness: Yes, sir, no doubt it was, not the slightest doubt because the writing is there that is plain.

Q. Well now the marking on Exhibit D9 omits the words "and beach" and makes it simply "Line of outside sand hills." Now is it a fact that this line was the line of the beach as well as the line of the sand hills?

A. Line of the sand hills, this is all beach.

Q. What do the words "and beach" mean as appearing upon Exhibit P3, is it to distinguish it from the sand hills?

A. I don't think it is.

Q. Do you know then why the words "and beach" were placed upon Exhibit P3?

A. I do not know.

Q. Well assuming that Exhibit P3 is correct, this same line would indicate then that it was the line of the beach as well as the line of the sand hills, would it not?

A. Identically.

Q. Now what is meant by the words "Line of the beach"?

A. Line of the sand hills.

Q. Now suppose you strike out sand hills, what would it mean, the line of the beach?

A. I should take it to mean the point where the flat sands began and where the storm tides would come up.

Q. You wouldn't think it had any reference whatever to the line of the ordinary high tide, would you?

A. No, sir.

Q. Why is the importance attached to the line of the storm tide rather than to the line of ordinary high tide?

226 A. I don't know.

Q. In your later experience where you show the high water mark would you not show the line of high water mark, the ordinary line of high water mark, rather than the line of the storm tide?

A. Probably, there are times when we are more particular than we were then. That was a barren waste at that time. We had very little time to do the work and did not go into the minutiae.

Q. Mr. Rowand, you don't pretend to be able today to remember whether there were sand hills all the way along the beach front, that is independently of this map, do you?

A. I say there was, all the way down. I surveyed the beach from one end to the other since that time and those sand hills extended away down as far as Cincinnati Avenue, which is the extreme end of the land company's land. I think there was a place—I can not say just what avenues, where the sand hills back towards the meadows and when the storm tide came it flooded all of those lands, but as for every foot of the ground I cannot say as to that.

Q. Do you mean that there was substantially an unbroken range of hills extending from one end of Absecon Beach, from the easterly end of Absecon Beach to Cincinnati Avenue?

A. With the exception that I mentioned I do, not unbroken because they were all heights with little spaces between them; very irregular.

Q. When did you next see Absecon Beach after you assisted your father in this surveying work?

A. I was there in 1854, the day before the formal opening of the railroad.

Q. On pleasure or for business?

A. Well it was pleasure.

Q. You did not go down and look over the lands there?

227 A. No, sir.

Q. Well I suppose it was a number of years before you had occasion to check up this surveying work, wasn't it?

A. I never checked it up at all. Whatever we have done up at the upper end of the beach has been in relation to streets, with the owners of the United States Hotel, the Chamberlain tract.

Q. How long—was that when that was made?

A. Several years, four or five years. Didn't have any occasion then to know the high water mark or beach front conditions, nothing but the street work.

Q. Did you ever have occasion as surveyor or engineer to note the beach front conditions for a period of twenty or twenty-five years after this map was made?

A. No, only as regards those two suits that have been mentioned, the land company against Lippincott and against Evans.

Q. And when were they?

A. Well, I don't know what years they were.

Q. Some fifteen or twenty years ago, about?

A. Longer than that I think now—it was after the Haddon Hall and the Seaside had been moved from the original location over the accretions, down to the seaside, the ocean.

Q. Now you made no attempt to locate the line of ordinary high water, did you, when this survey was being made?

A. I don't remember that we did.

Q. Nor did you attempt to make an accurate location of the low water mark, did you?

A. We tried to, but the best we could do, we could not—every line we ran out there we could not wait for the tide to go down and in straight beach front it would be about a uniform—

228 Q. Didn't take levels, did you?

A. No.

Q. To determine accurately requires a series of levels to be taken.

A. I shouldn't think it would, but it might.

Q. To get the average ordinary——

Mr. McCarter: Are you talking about low or high now?

A. The high water mark is there, the low water mark depends upon other things, varies from day to day.

Q. At the time this survey was made the high water mark was regarded as of much consequence, was it?

A. No, sir.

Q. Nor was it regarded as very important to accurately locate the low water mark on the beach front, was it?

A. No, couldn't do it accurately.

Q. As a matter of fact the value of the beach front at that time was not appreciated, was it?

A. No.

Q. The more desirable property was considered to be away from the beach, wasn't it?

A. Yes.

Q. How much time did you spend along this corner where New Hampshire Avenue and Vermont Avenue now is, that would be the Doughty and Pitney or 34 acre tract appearing on Exhibit D?

A. I could not tell anything about that now. Remember that has been sixty-five years ago.

Q. Well you don't suppose you spent a full day on that particular 34 acres, do you?

A. In surveying the whole 34 acres?

229 Q. No, on that particular part of the 34 acres?

A. No, sir, I don't think we would.

Q. The chances are you would not spend more than an hour or two so far as the beach front was concerned?

A. Probably not that long.

Q. How would you spend running that line?

A. I should think the width of that strip, one hour would give all that we wanted out on that edge, less time.

Q. And there was no reason at that time why you should observe the high water mark?

A. No reason why, no, sir.

Q. As a matter of fact you personally did not observe it, did you?

A. No, sir.

Q. And isn't it somewhat of an assumption that it was only the storm tides that reached the foot of the sand hills on your part?

A. I have been there a great deal, I never saw the ordinary tides reach the foot of the sand hills.

Q. Have you been up in this section a great deal?

A. Not lately.

Q. I didn't ask you that.

A. Oh, why yes, I have been there a great deal.

Q. How often have you been up?

A. Oh, I don't know, perhaps three or four hundred times.

Q. In this particular section?

A. All the way around there, I can not just specify that one spot, I could not pick it out on the ground today.

Q. You could not?

A. No, sir.

Q. Well now let's see when did you next go there after 1852?

230 A. As I remember in 1854.

Q. That was a pleasure trip?

A. Yes, sir.

Q. Now when did you come there next after 1854 and go up to this section of the beach in dispute?

A. I can not tell you.

Q. Was it a matter of five or six years?

A. Don't know, I was there nearly every year I suppose.

Q. But you were there on pleasure.

A. That's all; I have done no surveying since my father did that part of the beach.

Q. You had no occasion to observe that section of the beach after this survey was made?

A. No, sir.

Q. You know nothing about the changes that occurred from that time on, do you?

A. Only I know that this point was washed away, the shape of the beach, I can see that very plainly.

Q. You remember when it had washed nearly up to the lighthouse?

A. I remember seeing water up to the lighthouse, I don't know when.

Q. You don't know when it was washed away, you did not see the process, isn't that so?

A. Yes, sir.

Q. You really haven't had a chance to again observe the position of the high water mark, since you helped your father as a boy to make this survey?

A. No, sir. That was his work, not mine.

Q. You were not responsible for it, were you?

A. Not at all, he was supposed to be an accurate and a reliable man.

Q. When did you become a surveyor?

A. I don't know.

Q. Just grew up?

231 A. Grew up with it, yes, sir, I did not go to learn my trade while I was at school.

Q. I think that's all, Mr. Rowand.

Redirect examination.

By Mr. Bourgeois:

Q. Mr. Rowand, your father did this survey for the Camden Atlantic Railroad?

A. Yes, sir.

Q. Roger Osborne was what, was he a draughtsman or engineer for that company later?

A. He was the engineer and director.

Q. Later—

A. Afterwards built the road.

Q. And it was his work that put the street system on?

A. Yes, sir.

Q. And you say that was how long afterward, extended over period of what time?

A. Must have been a couple of years. There was discussion amongst the owners as to how much should be given, where streets should be laid.

Q. There is a certificate on this map I think showing the rail company completed it in 1854. Is that probably the time when he completed the street system?

A. I don't know, I can not tell you.

Q. Now, Mr. Rowand, I notice in your note book here the following language. I am going to read it to you because I can read better than you can. "Absecon Island Beach, October 19, 1852. Commenced running October 20, 1852." And then I notice a few pages back further the following "Absecon Beach, Rev. Notes, October 21, 22 and 23." Then starts off on "Robert Bartlett Leeds, same land, beginning and so forth." Are those the dates on which this survey was done?

A. Yes.

(Objected to.)

Q. Tell me whether that memorandum is in your father's handwriting, where it says October 19th or where it says October 20th?

Q. Now I notice in here the following language, under Ruhama Conover. Who was Ruhama Conover?

A. I think she was a daughter of Jeremiah Leeds' first wife.

Q. I notice in part of this "Jeremiah Leeds and six children: Millicent his widow. Judith Hackett, Chalkley S. Leeds, Robert Leeds, Ruhama Conover, Rachael Steelman, Andrew Leeds. That the same Ruhama Conover, is it?

A. Yes, I think so.

Q. Now I notice at the bottom it reads as follows: "Ruhama Conover north $60^{\circ} 39'$ east 8 feet to the left 3.884 feet to post surf, south $26\frac{1}{2}^{\circ}$ east." Then it says: ten and fifteen apparent meaning I judge ten—

A. Ten chains, fifteen links.

Q. "To storm tide." Then I notice at another place, "Second south 20° east 21.88 chains to stake on left sand hill." I think that left—"32.15." Then—"to surf 34.15 along surf—" that would indicate from the sand hills to the surf at that point there was a difference of two chains, is that right?

A. 34—two chains, yes.

Q. (Continuing:) On sand hill 34.15—to surf 34.15.

233 Mr. Carr: If this is going in the record I don't know whether he is making an offer of this book or not, if you are—I am going to object to it, I don't see that the book is evidential.

Mr. Bourgeois: What I am trying to show is that Mr. Rowand was right when he said he went to the top of those sand hills. This contains reference to that very thing.

The Court: The witness can use it to refresh his recollection if he knows that at the time it was made it correctly set forth the conditions therein stated.

Mr. Carr: I would like to examine him about it, I don't think it ought to go in the record as evidence in the shape it is now. Mr. Bourgeois read a number of questions, and unless the book is admissible——

The Court: He is reading it, Mr. Carr, instead of having the witness read it because his eyesight is poor.

Mr. Carr: Yes, but I want to see if he can refresh his recollection as to this book.

Cross-examination as to book.

By Mr. Carr:

Q. Mr. Rowand, the book from which Mr. Bourgeois has been reading was a book in which your father made the entries?

A. It is.

Q. And when did the book come into your possession?

234 A. I suppose you might say after his death.

Q. Which was when?

A. 1880.

Q. And it was in his custody up until 1880?

A. He may have loaned it to somebody in the meantime, I mean it was there at the time of his death.

Q. But you didn't have it in your custody until 1880, did you?

A. Well it was in both of our custodies, we both occupied the same office and I could take the book any time.

Q. When did you first have occasion to refer to the entries that appear in this book so far as they relate to the territory in dispute in this suit?

A. Well I think in the trial of the case before Judge Walker.

Q. That is 1912?

A. I don't remember the year, 1912, I think, about five years ago.

Q. Then you had no occasion to refer to those entries from 1852 to 1912, had you?

A. No, sir.

Q. You did not see the entries when they were made?

A. My father was back yonder making the entries and I was on ahead.

Q. I mean you had no occasion to read the entries when they were made?

A. Certainly not.

Q. As a matter of fact you did not read those entries until 1912?

A. Well I can not say about that.

Q. You have no recollection about that?

A. No.

Mr. Carr: If your Honor please I shall object to the use
235 of the memorandum. He did not see the entries made, he
did not know what entries were made, did not refer to the
entries until some sixty years after they were made.

The Court: All right, maybe Mr. Bourgeois doesn't want to use
it any more, do you, Mr. Bourgeois? Mr. Carr objects to the wit-
ness' use of it because he did not see the entries made and never
had occasion to ascertain whether they were correctly made or not
until some sixty years afterwards.

Mr. Bourgeois: We are not going to consume time over it.

Direct examination (resumed).

By Mr. Bourgeois:

Q. Now, Mr. Rowan, you have been asked about measuring to
the low water mark and not to the high water mark. Can you tell
me whether or not all of the conveyances at that time, that is in 1852
and 1860 made in Atlantic City by Chalkley Leeds and Chamberlain
ran to low water mark?

Mr. Carr: I object, he was only a boy of sixteen in 1852.

Mr. Bourgeois: I know and I am not that old because I have
searched the records enough to know.

The Court: How will he know?

The Witness: I don't know, if that will settle it for you. I can
tell you something about some of the others down there made
236 by the land company. Some of those were made to storm
tide, some was made to the Atlantic Ocean.

Q. I think that's all.

Cross-examination.

By Mr. Carr:

Q. You only have an opportunity of measuring the low water
mark for about fifteen minutes during the day, isn't that so?

A. I think that on the Atlantic Ocean there is no such opportunity.

Q. Wasn't any opportunity to measure the low water mark, was
there?

A. No, sir.

Q. Then it was more or less a matter of estimate?

A. Yes, sir, after you ran down that, yes.

Q. That would be because the low water mark would be only ex-
posed during the change of the tide, isn't that so, while the high
water mark would be visible because it would be exposed all the
time, isn't that true?

A. Yes.

Mr. McCarter: Your man that made the map says there is no such thing as high water mark.

Q. You say about six days was spent in making this whole survey excluding the location of the interior lines shown on Exhibit P3, isn't that so?

A. I don't remember the number of days. That work was gone over pretty rapidly.

Q. It was probably completed in a week, wasn't it?

A. I think so, yes.

Q. Now a good part of that time was spent in the running of the interior lines, was it not?

A. I suppose so.

Q. You don't suppose you spent as much as three days along the beach front, do you?

A. The work down along the beach front would be when these lines were run out. Those would be measured across; here was all the work and here's where all the briars were.

Q. Well, you wouldn't spend as much as three days in running the low water mark, would you, around that whole tract?

A. Wouldn't spend any time in running the low water mark. The distance to low water mark was made by measuring down from his stake on the sand hills.

Q. At two or three points?

A. Well wherever the property line came to the beach.

Q. Then there wasn't any definite running of lines by surveying along the beach front, was there?

A. Not there, I don't think there is around by the inlet.

Q. Do you suppose as much as one full day was spent on the actual surveying of the lands along the ocean front?

A. I cannot tell, sir.

Q. Well in the nature of the work would there have been more than a day spent?

A. You mean the whole length of the beach there?

Q. Yes.

A. I suppose there would if we had run longitudinally with the beach.

Q. But there wasn't any line run longitudinally with the beach except as it marked the points—the corners of the division line, isn't that true?

A. That's so.

Q. So that for two-thirds of the front at least there was no actual survey to indicate either the high water mark or the low water mark?

A. Running along this way, no, sir.

Q. No longitudinal survey. Now can you say positively whether or not there was an actual survey around the bend and which would cover the end of the Chalkley Leeds tract shown upon Exhibit P3?

A. Where we ran around here?

Q. Yes, whether any survey was made, or whether what you did was to indicate the lines of division and then estimate the location of the—

A. We took the line of division and marked it there sand hills.

Q. Then there wasn't any longitudinal survey made along the beach front at all, was there?

A. That's on the inlet side?

Q. I mean on the ocean side?

A. No.

Q. Am I correct in saying that?

A. I don't remember.

Q. You don't remember any?

Mr. Bourgeois: No, he didn't say that.

Q. Well I will say, do you remember any?

A. Any what, any survey run there?

Q. Yes.

A. Around this way no, I do not.

Q. Is it your best recollection that there was no such survey?

A. No, I cannot say that either.

Q. As this work was being carried on, its principal object seeming to be to locate the lines of division between the various parties in interest, would there have been any occasion for a survey to show the lines of the ocean front?

A. I don't think there would.

Q. Then isn't it your best recollection and your best judgment that there was no such survey?

A. I don't think there was.

The Court: Don't the lines of the individual owners show the length of those lines?

The Witness: Yes, then following the ocean comparatively straight lines between the points—they were so near together.

Q. Now I note the word "strand" occurring upon Exhibit D9 in two places, have you any means of defining that term from any information imparted to you by your father during the course of the work?

A. Not from him I haven't, as to what he meant by strand.

Q. And your definition of it as indicating the line from the sand hills to the surf is your own definition, is that so?

A. Yes.

Q. And is simply your deduction from the word itself, isn't that so?

A. Only that strand was in general use indicating the beach front.

Q. Well what would they call it where there wasn't any sand hills would they call it strand just the same?

A. I don't know.

Q. Does the strand require that there should be a background or frontage of sand hills?

Mr. Bourgeois: He did not use the word strand, how can he give the meaning?

240 Mr. Carr: He has defined it.

Mr. McCarter: That was on cross-examination he defined

Now I don't think he is subject to argument about it, he did not use the word.

The Court: That is your meaning of the word strand?

The Witness: That was the difference between the storm tide mark and the ocean.

Q. Well where there is simply a beach without sand hills is the place on that beach and down to the surf the strand?

A. I have never seen such a beach as that.

Q. Never seen a beach without sand hills?

A. No, sir, not an original beach, I have seen improved beaches without sand hills.

Q. You had no way of determining where the line of the storm tide had come, did you, in the hour or two that you spent on this particular property?

A. Anybody could see by the debris where the storm tide came to, washed up to the base of the sand hills.

Q. How could you tell whether or not that was the ordinary high tide?

A. It was the line when I saw it.

Q. Doesn't the ordinary line of high water make its mark on the beach in the shape of trash?

A. Yes.

Q. Doesn't it make a perceptible mark?

A. The sand was there—above that it was dry, between that and the base of the sand hills.

Q. In some cases you find the sand hills back from the water half a mile or a mile, don't you, and a long flat beach?

A. Yes.

Q. Now is that strand all the way back to the hills?

A. No, sir.

Q. What would that be?

A. An ordinary storm probably would not flood that space and would call the little ridge along that as the storm tide line, ordinary storm; an extraordinary storm would flood that land.

Q. But strand would mean then a space flowed by the tide, whether it is storm tides or high tides or ordinary tides, isn't that so?

A. Yes.

Q. That is the word strand is associated in your mind with the land flowed by the tide, whether it be ordinary tide or a storm tide, isn't that true?

A. Well not altogether true. As I say in that case where the sand hills were half a mile back from the shore, from the ocean there would be a line where an ordinary storm tide would not overflow. An excessive storm tide would overflow that and run back to the base of the hill.

Q. But your strand then would be to the line of the ordinary storm tide?

Mr. McCarter: Not his definition, you are trying to accommodate his definition to the map. I don't think he should be asked to do that because he did not put the word on the map.

The Court: He has attempted to say what the word "strand" meant on the map. Now then the purpose of this examination is to find out whether the explanation given by him as to what he thinks it meant on the map is a correct one, or whether it is not, and the exact limitations of it and what not.

242 (Question repeated.)

A. Now as to what the word strand means by my father I don't know. He wrote that there sixty-five years ago and he gave me an explanation at the time of what was meant by strand, I think; I am only testifying here as to the correctness of that word by him not by what he meant.

Q. Then it is more or less speculative as to what it really means in your mind?

A. Yes, I suppose the dictionary would help us out very much in that matter.

Q. Do you know that Webster's Dictionary defines it as the space between the high and the low water mark?

A. I do not.

Redirect examination.

By Mr. Bourgeois:

Q. In a word Mr. Rowand, your understanding of strand is that part of beach between the storm tide line, and the line of the low water mark in which nothing but coarse grass will grow?

A. The level space.

Q. Part of it is above the high water mark, part of it is below the high water mark?

A. Yes.

Q. Now is that the understanding that people generally along the ocean front have of the word strand?

A. So far as I know it is.

The Court: What is this on this Exhibit P3?

Mr. Rowand: I see a line at the extreme left end of the
243 map, sort of faint line drawn inside of the number of water lines.

The Witness: I should suppose that was a continuation of the line of sand dunes.

The Court: That cannot be so; there is the line of sand hills.

The Witness: Oh, yes, here it comes here. Looks to be as if something was put on there and then changed, because there is the mark, the dots where it has been run by an instrument you see, course has been taken between the two.

By Mr. Bourgeois:

Q. Now Mr. Rowand, in measuring down these lines you say you would measure to a stake, then from that stake down to the low water mark?

A. Yes.

Q. Now how would you determine what was the low water mark, practically just how do you do it?

A. Well my father did that work, I don't remember, I don't just—how he got at it now, cannot tell.

Q. Do you recall if he had rubber boots on?

The Court: You are leading him.

A. (Continuing:) Don't think they wore them in those days, I think that's a subsequent invention.

Q. Well do you know this—I am asking him to refresh his memory. Do you know if he walked out into the surf to where he thought the tide would be in the event there wasn't any swell there, and measured from that point up?

(Objected to.)

244 A. I am pretty sure he didn't, at least I didn't see him do it. He could assume that just as well from the shore as he could out in the water.

Q. I think that's all.

JAMES W. LEE, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Bourgeois:

Q. Captain, you live where?

A. Ocean City.

Q. And you are how old?

A. In my 73rd.

Q. How long a time have you lived along the ocean front?

A. I have been acquainted with it all my life, but I lived in Ocean City about thirty-six or thirty-eight years.

Q. What is your understanding of strand?

Mr. Carr: I object. I don't think this man is skilled as a lexicographer. I have live along the shore quite a while myself, but I don't pretend to be skilled in definitions. Proximity to the sea I don't think qualifies a man in the definition of words.

The Court: The word may be given a meaning there that would be possibly slightly different than given somewhere else. I think a person in a community where the meaning of a word is in controversy could testify as to what the meaning generally was of that word in that community at a given time, and that that would then show with some degree—would be some evidence that the word was used in the instrument or what not in controversy with that meaning at that particular time. It is not what he means now as to what the meaning of strand was, but what it was back in ancient days to speak.

Mr. Carr: How is was so considered down there at that time.

The Court: Yes.

Q. How old are you Captain?

The Witness: Seventy-three, nearly.

The Court: And you have been at Atlantic City how long?

The Witness: I have been at Ocean City, that's the next beach below just across the inlet.

The Court: How long?

The Witness: I have been there in Ocean City ever since the first house was built, thirty-eight years, acquainted with the beaches long before I was there, even; lived in Atlantic City when what you call the jetties was made, lived there three or four years, lived there at the time they was built.

Q. Well now, when you first became acquainted with the beach and beach land and became acquainted with the word strand, what was the meaning that was applied to that word by people in that vicinity, that is along the beach?

246 Mr. Carr: I object to that unless the time is fixed. This map was made in 1852, and it is the current use, the secondary or peculiar definition it may have had down there in 1852 among people who lived on Absecon Island, if there was anybody living there.

The Court: He says he has been there how long, thirty-six years.

The Witness: Yes, sir.

The Court: Where were you before that?

The Witness: I was on the beach all my lifetime, going to and fro, going down the 4th of July and various other day along the beach when I was a boy.

The Court: Sixty years ago?

The Witness: Yes, sir.

The Court: Did you ever hear people in those times speak of the strand?

The Witness: Always spoke of the strand.

The Court: Now what was the meaning?

The Witness: In fact we did not know of it by any other name but the strand.

The Court: When people spoke of the strand at that time, what did they mean?

The Witness: All that piece of property that was bare
247 when the tide was down, between the foothills and the ocean.

Q. In other words from the foot hills to the low water mark was the strand?

A. Yes, sir.

Q. That included the land between high and low water mark and also that flat land above high water mark to the foot of the hills to the storm tide?

A. The flat land above high water mark, or above the ordinary high water mark, what we call neat tide—then a storm tide came over that up to the foot hills so it made it all strand. Sometimes it

would grow up in little weeds and grass during the summer. In the winter time they would be washed away. We all called it all strand.

Q. Now have you ever had any occasion to study the effect of the inlets?

A. Yes. They seem to be constantly changing, so does the front.

Q. Now tell me how those inlets change, does the channel change in those inlets?

A. Yes.

Q. Are you familiar with Great Egg Harbor Inlet?

A. I am, I remember when it was all water where the gardens are now built up.

Q. That's Ocean City?

A. That's Ocean City, I remember when Longport extended down to the one channel and was a big lot of land around here, as much as a mile and a half from where the boat landing is now to the inlet, big high hills which have all been washed away.

Q. That's on the Longport side?

A. That's on the Longport side.

Q. You say that's all washed away?

A. That's all washed away, the inlet is as wide again as it ever was.

Q. What about land on the northern end, the Ocean City Beach?

A. That's all made up.

Q. How many acres—that's what you call the Garden tract?

A. That's a big lot, there are five hundred houses on it I expect.

Q. Now you say that the channel shifts. How does it shift, south or north?

A. It generally works northerly a while then it will break out slow and then move—the other channel moves in and another one breaks out above and they fill up. There were three channels across between Ocean City and Longport when I first went to Ocean City.

Q. Now what was the effect when the southerly channel closed in Ocean City?

A. Moved towards Longport.

Q. That is the land made up on the northerly end of it?

A. And moved towards Longport.

Q. What was the effect on Longport?

A. Washed it away.

Q. The same as between Brigantine and Atlantic City?

A. Same thing.

Q. Is that also true down at Townsend's Inlet?

A. I am not so well posted down there but I think it is true, I am not posted down that way.

Q. Did the Government build any jetties at the end of the Ocean City beach?

A. Oh yes, moved the house away when it washed in.

Q. But you didn't have any jetties out there?

A. Did not, no.

Q. Simply the channel changed?

A. The channel changed of its own accord.

Q. The beach washed away from Longport and landed on Ocean City beach?

A. That's what we all say.

The Court: Well is Longport to the south?

The Witness: Just north.

The Court: Then it moves from Longport over to Ocean City?

The Witness: It moves from Longport over to Ocean City.

Mr. Bourgeois: Exactly a reproduction of Brigantine and Atlantic City.

The Witness: It depends your Honor on the condition of the winds. If you have numerous northeast winds it creates a current running down the beach, then the sand will wash off the north side and go over on the south side. Now if they are the prevailing winds for three or four years, which you know is the case, sometimes, then if the wind prevails from the southwards all the time it starts a current. Then it may run back. Now it altogether depends on what kind of winds you have. If you can tell me what causes all this shifting of snow storms around a barn or a house I can tell you what causes changes of sand, it is just like the snow bank, goes where the wind and tide takes it.

250 Cross-examination.

By Mr. Carr:

Q. What's your business Mr. Lee?

A. At the present time?

Q. Yes.

A. I keep a store.

Q. At Ocean City?

A. Yes, sir.

Q. Where did you live in 1852?

A. In 1852, well I was very small then you know, I was born in '45.

Q. Eight years old?

A. Seven in '52.

Mr. Bourgeois: We had a man remembered the high water line when he was seven years old.

The Witness: Well I couldn't remember that.

Mr. Bourgeois: Well he wasn't our witness.

Q. Where did you live in 1852 when you were seven years old?

A. A place called English Creek right on the river that goes into the inlet, goes up into the country five or six miles back from the beach.

Q. Back from where?

A. From Ocean City back on the river.

Q. How far away from the north end of Absecon Island would that be?

A. Well about nine miles I think it is from the beach up to Absecon.

Q. That's back in the country?

A. I was back in the county. Of course cross country wouldn't be much further.

251 Q. When did you live back in the country there, English Creek?

A. I lived there until I was about somewheres near—or some time about 1870, then I went to Tuckahoe.

Q. Until 1870?

A. '68 I think it was I went to Tuckahoe.

Q. That's 18 years after '52 you lived over on English Creek?

A. Yes.

Q. And then you moved to Tuckahoe?

A. Then I moved to Tuckahoe, that's on the same river,—not on the same river, the river forked.

Q. That's also inland?

A. That's inland, that's about nine miles inland or ten.

Q. How long did you live at Tuckahoe?

A. About ten years.

Q. That was about 1880?

A. Yes, sir.

Q. And may I ask when you got over on the strand at all, when you went?

A. I used to go down there three or four or five times a year, beach parties.

Q. Let's get at when you went down there. Up until 1880 you were living on the mainland.

A. No, I left English Creek in 1868, I think about that, '67 or '68, somewhere about that, I can not remember exactly, and then went to Tuckahoe and lived there ten years which would make '77 or '78. But in the meantime, the latter part of the time I lived at Tuckahoe I went to Atlantic City two or three times a week with truck. Then I moved to Atlantic City.

Q. When did you move to Atlantic City?

A. 1878, right from Tuckahoe, '77 or '78.

252 Q. How long did you live over there?

A. About somewheres two and a half or three years.

Q. Now you didn't hear the folks over in Tuckahoe defining the strand, did you, in 1852?

A. When I went on beach parties with them, which I did, we all talked about the strand, those that went on the beach parties, it wasn't talked of among the public, but when we went down there everybody talked of going on the strand.

(Question repeated.)

A. I don't know that I did so far as the individuals there were concerned, only when we went in parties we spoke about the strand.

Q. Did you go over there as early as 1852 with beach parties?

A. Well I can not remember whether I was over there in 1852 or not, I was only about seven years old, I don't think I did. I might have went with my father, I don't remember that.

Q. When is your first recollection of going over with a party?

A. When I was a young man running around among the

Q. You were more than eight years old then, weren't you?

A. Yes, sir.

Q. Now it wasn't until then that you began to hear people about the strand?

A. Well somewhere about that time,—I can not remember when I heard it called before, but when we went to the beach we would speak of going up to the hills, change our clothes and go out on the strand.

253 Q. Took a swim?

A. Yes, we had no bath houses in those days, we used the beach hills.

Q. Well now, did you hear anybody say that the strand was the space between the low water mark and the line of the ordinary storm tide on those occasions?

A. Not in those days, no sir.

Q. In fact the boys weren't talking about things like that when they were on these parties?

A. No.

Q. Now whom did you hear defining the strand with the same accuracy that Mr. Bourgeois defined it a few minutes ago?

A. I never heard it, any reason why it was called the strand. I never heard it defined any more than it was a common use to speak of this flat piece of ground I described as the strand, either there or anywhere else along the river where there was a flat sand called it strand.

Q. Did you ever hear it defined as the space between the low water mark and the line of the ordinary storm tide until Mr. Bourgeois asked you the question in the court today?

A. I think not, because I tell you in those days we didn't bother much with low water marks because they are movable. Nobody could establish a low water mark, nobody can establish a high water mark. You may establish a storm tide mark up around the hills where the storm tide don't come more than once or twice a year, perhaps two or three years at a time, all other lines you establish are movable, today and out tomorrow, you can not establish them, you have to guess at them, that's all.

Q. You guess at the low water mark?

A. You guess at them all.

Q. I think that's all.

254 Mr. ASHMEAD, recalled by the plaintiff testified as follows:

Direct examination.

By Mr. Bourgeois:

Q. Mr. Ashmead, I show you a small tracing and ask you if you know by whom that was made?

A. Made by myself.

Q. From measurements made on the ground?

A. From measurements made on the ground.

(Sketch marked in evidence Exhibit P4.)

Q. Now referring to this map which is Exhibit P4, I ask you what in addition to the street system it shows?

A. Shows the locus in quo in this case as I understand it and high water mark October 6, 1917.

Q. And also——

A. The Boardwalk as it now exists on the ground.

Q. Now it shows the easterly line of the Bartlett grant?

A. Yes.

Q. It does not show the westerly line?

A. No, only the one line.

Q. Can you tell me whether or not the westerly line crosses any part of the locus in quo colored pink?

A. It does not.

No cross-examination.

255 CLARK S. BARRETT, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Bourgeois:

Q. Mr. Barrett, you are the assistant secretary of the South Jersey Title Company, are you not?

A. I am.

Q. Have you for me made an investigation to learn in what plots—I mean what courses the lands lying south of Pacific Avenue and westerly of—well, I guess all the way down to Missouri Avenue have been sold?

A. They have been sold in parcels running at right angles to the avenues in practically every instance.

The Court: What avenues?

The Witness: That is to Atlantic Avenue, Euclid Avenue, Pacific, Dewey Place, New Hampshire Avenue.

Q. And all the cross avenues?

A. Yes.

Q. Do you know if some of the land in the section south of Dewey Place and south of Oriental Avenue and easterly of Vermont Avenue have been made by accretions?

Mr. Carr: Does he know?

The Witness: Not by personal knowledge.

Mr. Carr: I think that's as far as you can go.

256 Q. And you have heard that they have?

(Objected to.)

A. Yes.

Mr. Bourgeois: Well I want to predicate another question on it.
The Court: It is not any proof.

Q. Now have the lands that are included in those lands that you understand have been made by accretions, have they also been sold parallel with those avenues?

A. Yes.

The Court: You don't mean parallel, at right angles?

The Witness: Well either at right angles or parallel.

The Court: Right angles to the avenues running east and west and parallel to those running north and south approximately.

The Witness: Practically that way, yes, they are all in rectangular lots.

Q. Now Mr. Barrett, have you made an investigation to learn how many titles there are, how many conveyances there have been of land lying south of Oriental Avenue and east of Vermont Avenue and south of Pacific Avenue and east of New Hampshire Avenue?

257 (Objected to as immaterial and irrelevant.)

Mr. Bourgeois: I am going to show if your Honor please, how many conveyances there have been there of these lands for the purpose of showing how the people themselves have determined the accretion land.

The Court: I don't see how that can determine it.

Mr. Bourgeois: We are going to contend that it can, that is the object of the proof.

The Court: Well your title doesn't run at right angles.

Mr. Bourgeois: Well yes, ours runs at right angles too.

The Court: How, here is your line.

Mr. Bourgeois: It doesn't run that way; that's what they are trying to make it; there is our land (indicating).

The Court: I understand that this piece of property here that now indicate is the Bartlett grant that you claim to own?

Mr. Bourgeois: Yes.

The Court: In some part of that property is property which defendant claims to own?

Mr. Bourgeois: Yes.

258 The Court: Now the part of the property which defendant claims to own of your piece of property is east?

Mr. Bourgeois: East of New Hampshire Avenue.

The Court: East of the right angle that there would be from Pacific or Oriental Avenue?

Mr. Bourgeois: This is our claim: We say that we have 190 feet here, and that it went right along that avenue, right down, and therefore this riparian grant here does not affect our title. We have title by accretion, the accretions followed that street right straight down

The Court: Wait a minute, I am mistaken, this Bartlett grant is their grant, I see I am mistaken. You claim that you own up here?

Mr. Bourgeois: That's right, we own up there and the accretions made right straight down. We say we are entitled to them, they say we are not; we don't claim any rights by riparian grant.

The Court: I don't know anything about the case. I will take the testimony subject to your objection.

(Question repeated.)

A. I have counted the conveyances that have been made of the lands lying between Pacific Avenue, New Hampshire Avenue, and the inlet, and I find there have been 106 deeds placed of record affecting those lands. I have not actually counted the number lying between Pacific and New Hampshire, Vermont and the Atlantic Ocean.

259 Q. Between Oriental, have you counted between Oriental and the beach?

A. No, I have not actually counted them.

Q. Can you tell me how many there are approximately?

Mr. Carr: My objection goes to the whole line.

The Court: Yes, I understand.

A. Yes, there would be at least two hundred.

Q. Now Mr. Barrett then how many of them do you say do not run parallel with one or the other of these streets, either the main street or the cross street?

A. About three or four.

Q. And they are lands that follow out on some riparian line?

A. Yes.

Q. Have you made an investigation to find out how many mortgages there are on those two blocks of land?

A. Yes.

Q. How many are there?

A. On the block between Pacific and South New Hampshire there were seventy mortgages that have been placed since about 1900.

Q. And on the other block?

The Court: What do you mean the other block?

Mr. Bourgeois: Between Vermont and New Hampshire south of Oriental.

Mr. McCarter: I can not understand what he means by between Pacific and South New Hampshire.

260 Q. South of Pacific and east of New Hampshire?

A. Yes.

Q. Now I want to know between Vermont and New Hampshire south of Oriental?

A. About 85 I believe.

Q. And how have the descriptions of those mortgages run?

A. They practically all run at right angles to the street.

Q. Can you tell me what is the amount of the mortgages that

have been placed on the blocks south of Pacific Avenue and east of New Hampshire?

A. Why they aggregate \$573,957.

Q. And what is the aggregate on those south of Oriental between Vermont and New Hampshire?

A. I have not the exact figures on that Mr. Bourgeois.

Q. Now take the block immediately north of Pacific Avenue and east of New Hampshire, do you know how many conveyances there have been in that block?

A. Yes, there were about 102.

Q. How were they, the description of them, how did the description of them run?

A. Practically every one runs at right angles to the streets.

Q. Do you know if there are any mortgages placed on that block?

A. Yes, there have been a great deal of mortgages there.

Q. How many are there, if you remember?

A. Mortgages placed since about 1900 aggregate \$1,430,000.

The Court: Where is that block?

Mr. Bourgeois: That is the block immediately adjoining Pacific and easterly of New Hampshire.

261 The Court: And northerly of Oriental?

Mr. Bourgeois: No, northerly of Pacific.

Q. Now Mr. Barrett, you are familiar with the titles at Atlantic City, aren't you?

A. Quite familiar.

Q. From having searched them and researched them. Take the land south of Pacific and all the way along the beach front down as far as Missouri if you want to, or Albany Avenue. How do those descriptions run?

A. Practically all of them run at right angles to the streets.

Q. Take the seaside property for instance, that's 165 feet from isn't it?

A. I think that it is, although I could not say positively without referring to the deed, but it is my recollection that there is 165 feet between the avenue and the small street in the middle of the block.

Q. That's a 20 foot street, that made a 350 foot street, how did Charles Evans sell off his land, did he go off at right angles, I mean at cross angles, or follow a parallel strip right along Pacific Avenue down to the ocean front?

A. No, as his lands were formed by accretion he sold off numerous lots, rectangular.

Q. Moved his hotel front?

A. I don't know about that, but I know there are many deeds of record in the clerk's office at Atlantic County where he sold off parcels in rectangular shape.

Q. That was all between the 20 foot strip and Pacific Avenue that runs parallel with it and 165 feet from it?

262 A. Yes.

Q. Is that true of the other owners there where accretions have formed?

A. It is practically true in all instances.

Q. Do you know of a single instance where it is not true?

A. I don't recall any.

Cross-examination.

By Mr. Carr:

Q. Down in front of the Seaside the riparian line is a parallel line with Pacific Avenue?

A. It is 2,000 feet therefrom.

Mr. Bourgeois: Parallel with Pacific.

The Witness: Yes, 2,000 feet south and parallel with Pacific Avenue.

Q. That's all.

Redirect examination.

By Mr. Bourgeois:

Q. The high water mark is not parallel with Pacific Avenue though, is it?

A. At the present time, no.

263 ESTER D. RIGHTMIRE, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Bourgeois:

Q. Mr. Rightmire you reside in—well, you have a business place in Atlantic City?

A. Yes, sir.

Q. You were formerly city surveyor of Atlantic City?

A. I was in 1909, 1910 and 1911.

Q. Will you tell me if you know whether or not New Hampshire Avenue is an improved street?

A. It is.

Q. When was it improved?

A. I think in the summer of 1910.

Q. And in what method was the improvement provided for?

A. Why it was graded and a hard surface pavement put on south of Oriental Avenue.

Q. I mean how was the payment provided?

Mr. Carr: Does he know?

A. By the city ordinance passed by the city—money provided you mean?

Q. Yes. Were the benefits assessed?

A. The benefits were supposed to be assessed, I don't know whether they have been or not, that was not during my time.

Q. How far south was that pavement extended?

A. Why from north to the Boardwalk, within a few feet.

264 Q. That is a street of what width?

A. Fifty feet.

Q. Now you have done a great deal of surveying for locating lots and for locating buildings, and so on.

A. Quite a number, yes, sir.

Q. Do you know how the properties, that is how the boundary lines of the properties in Atlantic City south of Pacific Avenue run?

A. At right angles or parallel with the various streets.

Q. Do you know of any case where any land that has been made by accretion, the lots have been sold by the owners other than parallel or at right angles to those streets?

A. I don't recall of any.

Q. Never saw any.

Cross-examination.

By Mr. Carr: No questions.

Hearing adjourned to Thursday, October 11, 1917, at 10.30 A. M.

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Thursday, October 11, 1917—10.30 a. m.

Case Continued.

Appearances: Same.

Mr. Bourgeois: If the Court please we have received a certified copy of the map from the secretary of state's office, I would like to have that marked in evidence. I will now offer the commissioners' map and ask that it be marked.

Mr. Carr: My objection still stands I take it.

Mr. Bourgeois: Well that is only admitted I understand tentatively.

(Map marked Exhibit P5.)

Mr. Bourgeois: I will next offer in evidence the prior title to this land, first is the certified copy of proceedings in the Orphans' Court of Atlantic City December 10, 1838, of record in Book A of Bounds and Divisions, and Book A of the Minutes of the Orphans' Court of the County of Atlantic, showing the division of the Jeremiah Leed's propertice, including the land now in question.

(Received and marked Exhibit P6.)

266 Mr. Bourgeois: I offer in evidence abstract of deed, or rather I offer the deed and will have the abstract marked from Chalkley A. Leeds and wife to Robert B. Leeds, August 25, 1852, recorded in Book G, p. 1007, clerk's office Atlantic County.

Mr. Carr: May we have an opportunity to verify these.

The Court: Both sides may do that.

(Received and marked Exhibit P7.)

Mr. Bourgeois: I offer in evidence the record of a deed from Robert B. Leeds and wife to John McClees, July 9, 1856, of record in the office of the clerk of Atlantic County, Book I, page 425, and ask that the abstract be marked.

(Marked Exhibit P8.)

Mr. Bourgeois: I offer in evidence deed from John McClees to Jonah Wootton dated March 19, 1858, recorded in Book K, page 507, in the clerk's office of Atlantic County, Mays Landing, N. J., and ask that the abstract be marked.

(Marked Exhibit P9.)

Mr. Bourgeois: I want to offer in evidence a conveyance from John McClees to Jacob R. Eby, bearing date January 10, 1860, recorded in the clerk's office, Atlantic County at Mays Landing, Book M, page 708, I have not an abstract of that but will supply it.

(Marked Exhibit P10.)

267 Mr. Bourgeois: I offer in evidence deed from Camden Atlantic Land Company to John McVey, bearing date February 26, 1858, recorded in the clerk's office, Atlantic County, Mays Landing, Book M, page 710.

(Marked Exhibit P11.)

Mr. Bourgeois: I offer in evidence conveyance from John McVey and Harriet his wife and Jacob Eby and Elizabeth his wife to John McClees, dated January 10, 1860, recorded in clerk's office, Atlantic County, Book 42, page 189.

(Marked Exhibit P12.)

Mr. Bourgeois: Now if your Honor please I would like to offer two other conveyances I have not got here but I think there will be,—that is a conveyance from Manassa McClees for a triangular strip of land lying westerly of the westerly division line of the John McVey property, it being a triangular strip running from about Oriental Avenue to the low water mark or to the surf, and would run down the middle of what is now Victoria Avenue.

(Marked Exhibit P13.)

Mr. Bourgeois: I offer in evidence deed from John McClees to McVey for a triangular strip of land beginning in what is now the middle of Seaside Avenue extended and in the easterly line of the land of John McVey, thence running to the high water mark. The object of this conveyance, your Honor please is to show that the

parties made a conveyance of these triangular strips so as to
268 straighten their lines, making them run parallel with those
avenues.

(Marked Exhibit P14.)

Mr. Bourgeois: I offer in evidence a deed of conveyance from John McClees to the Atlantic Beach Front Improvement Company dated March 9, 1897, recorded in clerk's office, Atlantic County, Mays Landing, Book 211, page 174. That if your Honor please was the conveyance which Mr. Carr started out with and which we admitted was the common grantor of our present parties.

(Marked Exhibit P15.)

Mr. Bourgeois: I also offer in evidence a conveyance from the Atlantic City Beach Front Improvement Company to Charles G. Henderson, Jr., J. Franklin Moss, and John C. Hancock dated Nov. 1, 1899, recorded in book 237 of deeds, page 209.

(Marked Exhibit P16.)

Mr. Bourgeois: I offer in evidence conveyance from the Atlantic City Beach Front Improvement Company dated May 24, 1900, to the States Avenue Land Company, recorded in the clerk's office of Atlantic County in Book 244, page 418.

(Marked P17.)

Mr. Bourgeois: I offer in evidence conveyance from Charles G. Henderson, Jr., and wife to J. Franklin Moss and wife, John C. Hancock and wife to Roland Conrow, bearing date April 14,
269 1903, recorded in the clerk's office Atlantic County, book 287, page 76.

(Marked Exhibit P18.)

Mr. Bourgeois: I offer conveyance from Rowland Conrow and wife to States Avenue Land Company bearing date April 14, 1903, of record in the clerk's office, Atlantic County, book 286, page 113.

(Marked Exhibit P19.)

Mr. Bourgeois: I offer in evidence conveyance from the States Avenue Land Company to the Dewey Land Company, dated December 19, 1904, recorded in the county clerk's office, Atlantic County, Book 313, page 363.

(Marked Exhibit P20.)

Mr. Bourgeois: I offer in evidence deed of conveyance from the Dewey Land Company to Samuel F. Nirdlinger, the complainant, bearing date, December 7, 1907, recorded in Book 382, at page 19, for an undivided quarter interest.

(Marked Exhibit P21.)

Mr. Bourgeois: I offer in evidence record of deed from Dewey Land Company to Samuel F. Nirdlinger, dated January 20, 1909, recorded in the clerk's office, Atlantic County, Book 395, page 271, for an undivided one-twelfth interest in the land.

(Marked Exhibit P22.)

270 Mr. Bourgeois: I offer in evidence the record of a deed from the Dewey Land Company to Samuel F. Nirdlinger, professionally known as Samuel F. Nixon, bearing date, February 10, 1909, of record in the clerk's office, Atlantic County, Book 398, page 116, for an undivided one-sixth part of the lands in question.

(Marked Exhibit P23.)

Mr. Bourgeois: I offer in evidence deed from the Dewey Land Company to Louis E. Stern, bearing date July 17, 1912, recorded in the clerk's office Atlantic County, Book 486, page 443.

(Marked Exhibit P24.)

Mr. Bourgeois: I offer in evidence deed from Samuel F. Nirdlinger to Louis E. Stern, July 17, 1912, recorded Book 486, page 445.

(Marked Exhibit P25.)

Mr. Bourgeois: I offer in evidence deed from Louis B. Stern to Samuel F. Nirdlinger, bearing date July 17, 1912, recorded clerk's office, Atlantic County, Book 486, page 447, for an undivided one-half interest in the lands in question.

(Marked Exhibit P26.)

Mr. Bourgeois: I offer in evidence record of a deed from Louis E. Stern to the Dewey Land Company for an undivided one-half interest bearing date, July 17, 1912, recorded in Book 486, page 450.

(Marked Exhibit P27.)

271 Mr. Bourgeois: I offer in evidence record of deed from the Dewey Land Company to Samuel F. Nirdlinger, conveying one-half interest in lands in question bearing date, February 4, 1914, recorded in the clerk's office, Atlantic County, Book 523, page 47.

(Marked Exhibit P28.)

BARCLAY H. BULLOC, called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Bourgeois:

Mr. Carter: Before this witness is examined may I make this remark to the Court concerning this documentary evidence that has

just been offered, and that is that by offering it we did not wish to have the Court or counsel on the other side conclude or imagine that we have abandoned the view that I expressed at the opening that this issue does not involve our title. It is our view and always has been that the sole question under the pleadings as they stand and under the admissions of counsel in this controversy is: Is the claim of the defendant to the locus in quo as against us who are in possession, claiming a title a good or bad claim, and that the decree will simply adjudge that fact.

The Court: But does not the statute say that the decree shall settle the rights of the parties? It does not seem to me possible to determine the defendant's title or his right until we had the plaintiff before us, how could we determine until we knew what the plaintiff's right was?

Mr. McCarter: Well, my thought is this: Of course, I do not want to now discuss it and take time to discuss it in full but my own view is, and I think Mr. Bourgeois shares it with me, that the whole purview and scope of the act to quiet titles under which this action is brought and is pending, is not to determine whether or not the complainant, who is defendant, as the case develops, has a title; that his position is exactly similar to that of a defendant in ejectment and that after the man who claims to own and is in possession of property has filed a bill and has called in a claimant and made him assert his claim, the only subject for determination is the question whether or not that claim of the defendant is or is not a valid claim to the premises, and the question of the right of the plaintiff affirmatively—the complainant who is really the defendant—to the locus in quo does not logically and properly I think present itself. I do not care to make an extended argument upon that now unless your Honor desires it. It seems to me to be premature, but what I started to say was that by offering this chain of title, it must not be understood either by the Court or counsel that we abandon that position, but that we do offer them out of abundant caution because of the view that Judge Relstab entertained and expressed in the order requiring us to set up these deeds, or as many of them as we have set up, and we bow with deference to that order, and therefore offer these deeds in view of that order, but we shall contend at the end of the case, in our arguments that the position is as I have stated and that therefore these deeds are superfluous. By making this statement I do not want the Court to conclude that the deeds hurt us in any way, on the contrary they strengthen us, but we think it is an unnecessary anchor to windward.

(It is stipulated that the various conveyances in both titles did in fact convey high land or land above the Atlantic Ocean at the time those conveyances were made, except where they may have provided otherwise or by their terms attempted to convey land under water and that land between any high water mark and the existing high water mark were formed by accretions.)

By Mr. Bourgeois:

Q. Mr. Bulloc, you live where?

A. Atlantic City.

Q. How old are you?

A. Sixty-five.

Q. How long have you lived in Atlantic City?

A. Fifty-six years, moved there in '61.

Q. Do you remember back in '61 when you first came there?

A. Oh, yes, I remember when I came there.

Q. Where did you live?

A. We lived on Massachusetts Avenue between Atlantic and Pacific, next to Congress Hall.

Q. Were there any buildings at that time on Vermont Avenue?

A. On Vermont?

Q. Yes.

A. Not on Vermont.

Q. Where were they?

A. Easterly of Pacific, you mean?

Q. Easterly of Vermont Avenue.

274 A. Oh, yes, yes.

Q. What buildings were there, if you remember that were easterly of Vermont Avenue, who lived there?

A. A man by the name of Sharp.

Q. Well, was he easterly of Vermont, or was he easterly of New Hampshire yet?

A. Well, of course, easterly of both and on Vermont Avenue north of Atlantic, Mrs. Grey lived on one corner. Opposite her, not quite on the corner was an old colored family, the first in Atlantic City, William Bright, Mary Bright and son Daniel. Then north of that a little west was Notes, Joshua Notes. They were the three houses that I remember well.

Q. Do you remember this man Sharp, the rifle manufacturer?

A. Yes.

Q. Where did he have his place?

A. He had it up on a high hill about New Hampshire Avenue in this clump of trees.

Q. Was that above or below Atlantic Avenue?

A. That was between Atlantic and Arctic, which would be north of Atlantic.

Q. Now, Mr. Bulloc, during your residence there in your life have you made a study of the question of the tides?

A. Well, I have because that was my pleasure, out on the water all the time.

Q. Does a northeast storm make land or does it cut away land?

A. Well, it generally cuts in certain places.

Q. Will you explain to the Judge how that is done and why it is?

A. Well, a northeast wind brings in tides generally, the higher because it lasts longer, three or four days, sometimes a week. The

blow is generally very heavy and those tides of course
275 wherever there is any bluff cuts them down, the seas run
higher and cut down those bluffs and carry them southerly.

Q. Tell me how it is that it carries them out. What about the currents?

A. Well, the upper part of the ocean is moved by the wind and flows that way. The under part of the ocean is what they call the undertow, that flows the opposite direction, makes an undertow and that undertow carries stuff down in the bottom of the sea the opposite direction from the top which would be northeast, and that naturally deposits this, whatever it might be in places like little eddy tides, forming the deep cuts.

Q. In other words the pressure of the wind presses the top of the water on to the beach and that has to get out somewhere and goes to the bottom and goes in the opposite direction and that carries it out?

A. Yes.

Q. And that, is that the result due to the northeast storm cutting the beach away?

A. It is.

Q. Now, what about the westerly storms or westerly winds and northwesterly winds?

A. Northwesterly winds always makes land.

Q. Now, why do they make land?

A. Because after a big storm the sea is very high, the sea is—the waves is filled with this sand. It is all a mixture. You can take a bucketful and set it down, you will find in the bottom of the bucket a lot of sand and while that is stirred up the wind holds northwest and blows a gale, generally about three days, that blows the upper part of the ocean southeast, forms a strong undercurrent, undertow they call it, and that deposits this sand in on the beach. I have seen it in a couple or three days make as much as what it has taken away, just by that.

276 Q. In other words the undertow is always in the opposite direction?

A. Always.

Q. From that in which the wind blows?

A. Always.

No cross-examination.

Mr. Bourgeois: We want to offer in evidence the petition filed in the Court of Chancery asking or praying leave to open the final decree in the case of Dewey Land Company against Stevens and final decree and order entered thereon.

The Court: That is a petition filed by you?

Mr. Burgeois: By Mr. Carr, that completes that Chancery record. May we supply that?

The Court: Yes.

(Marked Exhibit P29.)

Mr. Bourgeois: If the Court please, I want to offer in evidence some bills of expenses paid by the complainant in this case. First is a bill of George W. Richman for paving New Hampshire Avenue, \$151.

(Marked Exhibit P30.)

Mr. Bourgeois: I offer a bill of George W. Richman for a balance of \$100.

(Marked Exhibit P31.)

277 Mr. Bourgeois: That's for paving on the easterly side of New Hampshire Avenue, the property now in dispute.

Notice of assessment for street improvement against Mr. Nixon and payment of it for \$160 dated September 6, 1910.

(Marked Exhibit P32.)

Mr. Bourgeois: Taxes for 1910, paid amounting to \$1,667.

(Marked Exhibit P33.)

Mr. Bourgeois: Taxes for 1911, amounting to \$1,792.03.

(Marked Exhibit P34.)

Mr. Bourgeois: Payment of taxes for 1912 amounting to \$2,093.47.

(Marked Exhibit P35.)

Mr. Bourgeois: Now, if the Court please, I want to offer a map that was proven yesterday to be correct, it was made by a surveyor who is now in the United States Service, captain in the U. S. Army.

Mr. Carr: Mr. Ridgeley was too young a man in 1881 to have made that survey. I do not think the map is admissible. He has not put those marks on there from original sources, it must be hearsay.

Mr. McCarter: Two of the witnesses have been shown this 278 map; it has been marked for identification and one of them has very specifically admitted that in 1881 there was a slough just as is shown and portrayed upon this map, therefore it seems to me the map is competent for that purpose, for illustration.

The Court: Wouldn't be competent to show that the location on that map of what the slough was is correct.

Mr. McCarter: Yes, sir, that's all we really offer it for, it is really to have a picture before your Honor's mind.

The Court: But it is not evidence that it is properly located there.

Mr. McCarter: No, sir, all right.

Mr. Carr: The difficulty your Honor, of course, the witness speaks of a general condition, that is the condition he remembers. Here are marks that are placed there showing a condition in 1881.

The Court: We won't accept it for that purpose, it is only for the purpose of showing exactly what the two witnesses have testified to, that's all.

Mr. Carr: General condition, I don't object to that, not as showing the exact location of any of the high water marks.

The Court: No.

(Received and given the same mark as for identification.)

Plaintiff rests.

279 JOHN W. WILSON, called and sworn on behalf of the defendant, in surrebuttal, testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Wilson, you live in Atlantic City?

A. I do at the present time, yes, sir.

Q. How old are you?

A. In March I will be seventy, this coming March.

Q. Where do you live in Atlantic City?

A. 22 North Rhode Island Avenue.

Q. How long have you lived in Atlantic City?

A. Three years the 22nd of this month I have lived there.

Q. When did you first know the beach in the neighborhood of Vermont, New Hampshire and Rhode Island Avenue?

A. Why, when I was a boy about eighteen—as far as I can remember about 1864 or '65, my mother and I used to go down on excursions on the Camden Atlantic Railroad from Vine Street, one day excursions, and while we were in Atlantic City my mother and I would roll along around the beach up around the lighthouse especially and go up to the inlet.

Q. Now, when you first knew the lighthouse section where did the water come with regard to the lighthouse?

A. Why I—well, my first trips to Atlantic City with my mother, we used to nearly always go up towards the lighthouse and I remember distinctly being in the lighthouse one day, and the lighthouse keeper, the man had charge saying that in storms the water has come up and struck the lighthouse.

280 Mr. McCarter: I move that that be stricken out, that certainly is not evidence, what the lighthouse keeper said about storms in reply to the question where the tide generally came.

The Court: I think I will have to strike that out.

Q. Where did the water come so far as you were able to see and did see: Where did the water come with relation to the lighthouse, how near or how far away?

A. Well, it has been a long while ago but it was not far off, I can hardly tell, probably fifty or sixty feet, something like that, but at the time I saw it then I didn't know I would be called upon to verify it. I don't suppose to submit a paper here—but it would give some idea, it was published in the Ledger, 1912. Of course, I don't submit this as evidence, but it gives you some idea how this was. It was taken from a painting in 1865, gives you some idea.

The Court: I think you had better strike that all out.

Q. The paper which you show me is a picture entitled "Atlantic City and Lighthouse, 1865." Does that describe such a condition as you saw there around 1865?

A. Well, as far as I can remember, I can not say accurately, it is about a facsimile that is I was a boy then of fifteen or sixteen years of age, that it is a facsimile and I know that in about 1867 that the storm water came up to the Congress Hall and washed out the porch, or ran in around the Congress Hall and that was situated on
281 the corner of Massachusetts Avenue, that the guests in the

Hall was very much excited and worried, afraid part of the hotel would be washed away. There wasn't many buildings around that neighborhood at that time, few and far between.

Mr. McCarter: The principal point of interest in this was the mosquitoes.

The Witness: There was plenty around there and green head flies the size of sparrows.

Mr. Carr: We would like to offer this picture if the Court please.

Mr. McCarter: Well, thirty-one years ago tomorrow I married into the family of George W. Childs, his niece, who was then the proprietor of the Philadelphia Ledger and we were always brought up with the idea that the Philadelphia Ledger represented absolute verity. I don't know that it does, but thirty-one years ago it did, I suppose that thing is about as valuable as the captain's paper the other day, it really doesn't prove anything of course.

Mr. Carr: It is only offered so far as the picture of the lighthouse goes.

(Marked Exhibit D14.)

282 Cross-examination.

By Mr. Bourgeois:

Q. Mr. Wilson, I understood you to say that was a correct reproduction of the situation there?

A. Well now, as far as my memory goes it was. The water was close to the lighthouse, close to it and you might call them cedar trees, pine trees sticking in the sand around and it was rather a dilapidated neighborhood.

Q. You remember the lighthouse?

A. Oh, I remember it, went up in it too.

Q. Do you remember that tree that is washed down there?

A. Well now, really, that's splitting hairs too fine.

Q. Well, that looks as if it were a pretty good sized tree.

A. It looks so there.

Q. And they were large trees there, weren't they?

A. Well, there were trees around there, but now in 1865 and 1917 is a hard matter to say, but I know that the water came close to the lighthouse, there wasn't much space between them.

Q. You have had quite a little experience in beaches and had an opportunity to observe them?

A. Well, I observed the beach on the northern part of Atlantic City—that according to my memory changed oftener and further along the beach, the simple reason was——

Q. Let me ask you something?

A. Beg pardon?

Q. That is a fact, isn't it, that large trees on the seashore grow only on the high fast land?

283 A. Well, I never took particular notice right along the shore except right around the lighthouse some trees—but up on Atlantic Avenue on those sand piles the houses was few and far between. Along Atlantic Avenue a great many lots were sand banked and grass there and even shrub pine trees.

Q. I know—red cedar, weren't they?

A. I cannot—trees apparently.

Q. But you never saw any red cedar trees growing right down close to the high water mark unless the tide had washed in?

A. No, I cannot remember now, particularly distinctly.

Q. That's all.

JOHN H. GRAHAM, called and sworn on behalf of the defendant, in surrebuttal, testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Graham, are you an Atlantic City man?

A. Yes, sir.

Q. And how old are you?

A. 58.

Q. How long have you known the inlet and lighthouse section at Atlantic City?

A. For about forty-five years, since 1872 I went there.

Q. When you first knew the beach in the lighthouse section where was the high water with relation to the lighthouse?

284 A. Well, at that time, 1872, it came up from near the lighthouse yard on the north corner—this is on Vermont Avenue and Pacific, it cut away and washed in under the lighthouse yard, I suppose 175 or 200 feet to the lighthouse.

Q. Now, was Vermont Avenue there at all south of Pacific?

A. Not south.

Q. Was New Hampshire on the ground at all south of Pacific?

A. No, sir, not at all.

Q. Was Maine Avenue there at all?

A. Maine is further up?

Q. Maine is the first Street in Atlantic City?

A. Well, I cannot say whether all of it was there—one portion might have been there, but not laid out.

Q. Well, were there any lots at all, any south of Pacific Avenue when you first knew the lighthouse section?

A. Not above Massachusetts Avenue.

Q. Nothing above Massachusetts Avenue?

A. Nothing above Massachusetts Avenue.

Q. And do you know about where the high water mark curved around so that it crossed Pacific Avenue?

A. Where it curved in—it started from Rhode Island, cut in here, cut Pacific Avenue way up to the lighthouse property.

Q. In other words the high water line crossed Pacific Avenue?

A. That crossed Pacific Avenue just above Rhode Island, just taking off the corner of Rhode Island Avenue.

Q. And then east of Vermont Avenue and south of Atlantic were there any lots—perhaps you can tell better by reference maps. Here is the lighthouse, Vermont, New Hampshire, here is Maine.

Now, I understood you to say that the water came around here and cut off the easterly corner or southeasterly corner of the lighthouse property?

A. Yes, sir.

Q. And then it went somewheres northward. Now where did it go?

A. It got up to Arctic and then went up to the railroad.

Q. It crossed Atlantic Avenue somewheres, of course?

A. Yes.

Q. Now, did it cross Atlantic Avenue somewheres east of Vermont Avenue?

A. It crosses somewhere east of Vermont Avenue, I couldn't say how far, or northeast.

The Court: What do you mean the shore line?

The Witness: Yes, the shore line came around and worked its way north.

Q. Well, was it west of New Hampshire Avenue and east of Vermont Avenue?

A. Yes, sir, to my knowledge.

Q. Can you give us any idea whether it was midway of the block?

A. I couldn't exactly.

Q. At any rate no part of New Hampshire Avenue was in existence at that time south of Atlantic Avenue?

A. No, sir, south of Atlantic Avenue.

The Court: You don't mean that the avenue was, but you mean that no part of the land upon which the avenue is now was in existence.

The Witness: Well, some portion of the land, by they haven't been laid out there.

286 The Court: We understand that, but was the land over here to the southeast of the lighthouse, was that in existence at all?

The Witness: Not southeast, no, sir.

Q. In other words there were no lands southeast of the lighthouse at that time?

A. No, sir, up at the northeast, to the northward further there were.

The Court: What do you mean northeast?

A. You see right opposite the lighthouse is southeast, and as you go up northeast, this is to the northward of the lighthouse.

Q. The inlet would be northeast from the lighthouse?

A. Yes.

Q. Taking the two blocks south of Pacific Avenue and bounded by South Vermont and Maine, were they there at that time?

A. They are south of Pacific.

Q. Yes, they are southeast of Pacific.

A. No, there was no land there, that was water.

Q. Now, did you work on the Government jetties?

A. Yes, sir.

Q. Do you remember where the first jetty was put up?

A. Well, the first jetty that I worked on, they were right opposite the lighthouse, those square cribs. I worked on those and helped fill them in with brush and stone.

Q. When did they put them down, do you remember?

A. 1876, that's when I worked on them, '76.

287 Q. That's Centennial year?

A. Centennial year, yes, sir.

Q. Now, from that time on did the land begin to make outward?

A. Very slowly, there was a big bar there on the outside, a south bar. The channel changed, worked off to the eastward. That south bar worked in, raised and made a big slough in there. In that place I sailed a boat, caught fish probably four to eight feet of water in there.

Q. Do you ever know a time when the high water mark was out further than it is now?

A. No, sir, it is furthest out I remember.

Q. And has the land gradually been making over all these years from 1875?

A. Yes, sir, gradually making now.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Graham, what direction did the beach take in 1872 from where it crossed Pacific Avenue up to the inlet, about parallel with Vermont Avenue?

A. Worked easterly.

Q. How much?

A. Well, it has gone out I suppose two squares and a half or maybe more at the present time from the time——

Q. At that time it must have gone up almost parallel with Vermont Avenue?

A. Almost.

Q. Almost parallel with Vermont Avenue? Now, I show you this and ask you if you aren't mistaken about that.

A. Well, I ain't much on maps.

288 Q. I know, but you can see this part, you know the railroad that's been there always?

A. Yes, where is this going?

Q. That's going to the inlet up along Maine Avenue. Now, here is Vermont Avenue and if the inlet line had gone parallel with that it would have washed the railroad out before it got to the inlet?

A. If it had gone up that way it would.

Q. If it had gone up parallel with Vermont?

A. The way it went was on a curve.

Q. Yes, that's right, it came from Pacific and curved around up Maine Avenue, didn't it?

A. Yes, but it went in close to the railroad.

Q. After it got above Madison?

A. Yes.

Q. It wasn't in close to the railroad until it got to Baltic?

A. No.

Q. After it got to Baltic it got close to the railroad that protected it?

A. Yes, sir.

Q. So that the shore line came on a curve and crossed somewhere in the intersection of New Hampshire and Atlantic Avenue.

A. Yes, sir.

Q. Now, you remember when that slough made up, don't you?

A. Yes, sir.

Q. And that added to the bend of the beach?

A. Yes, sir, that added to the bend of the beach, that's what built up the point of the beach.

Q. And that slough lay northeast of the point of the beach, didn't it?

A. Northeast of the lighthouse.

Q. So that when that made in it made the point of the beach there?

289 A. The main part of the slough was right opposite the lighthouse, between Vermont and Rhode Island Avenue and ran down to almost Massachusetts.

Q. These tides that you speak of coming up to the lighthouse, they were the storm tides, were they not?

A. Well, came up to the lighthouse at ordinary high water.

Q. But those that come up to the lighthouse, they were the storm tides?

A. Yes, they would wash up to the lighthouse.

Q. That's all.

TIMOTHY HOWELL PARKER, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Carr:

Q. Captain, where do you live?

A. Well, I should say at Longport, now.

Q. Captain, were you in the United States Life Saving Service?

A. Yes, sir.

Q. How long were you in that service?

A. Well, I was in real service thirty-eight years, and two years on pleasure.

Q. Where were you stationed in the life saving service?

A. Longport, Atlantic City, Chelsea.

Q. At Atlantic City were you stationed at the station immediately adjoining the lighthouse?

A. Twenty-six years, from '79 to '95.

290 Q. When did you first know Atlantic City, Captain?

A. I think about the spring of 1860 or '61.

Q. Now, at that time do you know where the high water mark was, do you know where the water was with relation to the lighthouse, in 1860, or '61?

A. If I was to explain, or try to, to give my words correct, you would doubt my words.

The Court: No, we wouldn't.

A. (Continuing:) Because you would say I wouldn't be old enough to remember that much, it would take me two days and a half here to give the evidence.

The Court: Just answer the questions, they know what they want. I don't.

Mr. McCarter: I am asking whether you mean storm high water mark or ordinary high water mark?

The Witness: I can give you either one.

Q. We will take them one at a time. Take the ordinary high water mark first.

A. Well, in 1860, I suppose to get at it right I would have to give what it was caused me to get there, at that time.

The Court: No, never mind about that.

A. Well, I was going down to Atlantic City on an errand and I heard tell of a jail and I wanted to see a jail.

291 Q. A jail?

A. Yes, sir, the first jail was built at Atlantic City and I went down to see it.

The Court: Have they got one there yet?

The Witness: The same one there yet, I can take you there and show you it. That stands back of the Vermont Hotel. Well, we went and looked at the jail made out of three by four stuff like they use in buildings now, nailed this way. Well, we heard a pig squeal way down on Atlantic Avenue in quite a clump of pine and cedar woods, so we went down to see what was the matter with the pig, and it was quite a ways then to the water line, but you had to go through the brush, a footpath to get out to the surf. I could not say but I suppose very near where Maine Avenue is now, by the way it looks, that was the first trip.

Q. Did you get the pig?

A. No, the man said he wanted it for winter, that's what caused me to be there.

Q. You haven't told us about the high water mark.

A. You haven't asked me yet.

Q. Where was the water?

A. I couldn't see it, it was beyond this brush.

Q. Tell me where you did see it?

A. Well, when I did see it to know where it was, was in '74, either '73 or '74.

Q. Where was it then Captain?

A. Well, it was right near, that is in front of the lighthouse to Vermont Avenue. I worked on the jetties there when they built them.

The Court: Where did you say this jail was located?

292 The Witness: On Atlantic Avenue and Vermont, Vermont and Atlantic right back of the hotel.

Mr. Arnold: East side of Vermont and north of Atlantic.

The Witness: That's it, it is turned around now.

The Court: Now then, you say that at that time you went towards the inlet, towards Maine Avenue and it was all covered with brush and you did not see the shore line. How about the shore line? Where was the shore line, here is the jail.

The Witness: That's the jail, where is Vermont Avenue?

The Court: There is Vermont.

The Witness: We went out here to the jail and I suppose where this house is, about along there was the pig pen, over here along Atlantic Avenue; then from that pig pen there was brush and trees, pine and cedar trees along here, but how far it went out to there I could not say, because there was a row of brush and a path went down here to a building; they said you could go there and get something to drink like beer, the like of that if you wanted to. Out here in these trees and bushes, I suppose that's the building they called Sharp's Building. I understood it was.

The Court: Now, how far was the shore line from the jail in this direction, that is out towards Pacific Avenue.

293 The Witness: Well, I don't know, I didn't take notice down this way at that time. Of course, that was quite a good while ago and we was only out here to see the jail, that was the principal errand that I got out to the water and then following up the pig squealing.

Q. Now Captain, in '74—you say you were working about that time on the Government jetties?

A. Yes, sir.

Q. Did you work on both jetties?

A. Yes, sir, all three of them.

Q. Where were the jetties somewhere in the neighborhood of Arctic Avenue, where were they?

A. That was a spur put off from the railroad that runs up

to the inlet just a little ways this side Arctic, probably on the side of the avenue and run right out.

Q. Do you mean it started a little south of Arctic or a little north?

A. A little south.

Q. How far did they run out, Captain?

A. I suppose it was piled about three hundred feet.

Q. It was piled about three hundred feet out?

A. Yes, sir, find it now, it is there yet.

Q. Now, can you show us where the high water mark ran at that time crossing say Vermont and New Hampshire Avenues. Suppose you start with Rhode Island. Here is the lighthouse, is that your house right across from the life saving station?

A. Yes, sir, both of them is mine. Now, this is the railroad that's coming up.

Q. This is the inlet?

A. That's the inlet, there.

Q. Yes.

A. I suppose like that (indicating with finger).

294 Q. Could you do that with a lead pencil?

A. Yes, sir, I have made two or three maps out for the court and the Government.

(Witness is referring to D13.)

A. Now, that's when the jetties were put there, you want it when the jetties were put there?

Q. Yes, which would be about 1875?

A. '74 they started them jetties, I think that's when it was. Now, that would be the front of my house. There is where the first Boardwalk went and the tide washed right up to Atlantic Avenue something like that. It had a bend in there.

The Court: Where did it go down this way?

A. (Continuing:) This is Pacific. There was a little straight place went like that right in front of the lighthouse, turned right around that corner like that, come down Oriental—wasn't no Oriental there—can't put that in there—this was Pacific, that was a man's house by the name of Spooner. Now, they come on down Massachusetts Avenue pick the corner of Spooner's house astern and everything right out from under it. That's Sharp it says now, but that was Spooner's.

The Court: The line marked S—S on D13, is the line drawn by the witness.

Q. Now Captain, what years were you in the service at the Atlantic City Life Saving Station about, commencing when?

A. I commenced 1879.

Q. And how long did you stay at this Atlantic City station?

295 A. 1905.

Q. 1879 to 1905?

A. Yes, sir.

Q. Now Captain, have you ever known at any time when the high water mark at the foot of Vermont and New Hampshire Avenues was any further out than it is now?

A. Yes, sir.

Q. When was that?

A. I just can't remember exactly what year, but I think by the 1908 big storm, it was in 19—or 1887. It was 1888 or 1889, that we had the big storm, wasn't it, and it wanted to sweep away the island, couldn't anybody get off three days. I don't remember whether it was '88 or '89. And if that was in '89 the beach was further out in '88. If it was in '88, it was further out in '87. It was very nearly as far as it is today.

Q. Well, what I mean to say, do you ever know a time when the beach was out any further than it is now?

A. Out any further than it is now?

Q. Yes.

A. Well, I would have to explain to you why that caused it to be out there. Probably you will ask me after a while.

Q. Was there ever any more land any further out than there is now, so far as you know?

A. Well, I can not tell whether it was any further out in one sense and I think I can.

Q. Well go ahead, tell it in your own way, Captain.

A. Well now, this pond that they talked about, you know this slough that you talk about, you know each end of that was tide and one end was tide sooner than the other. Now the upper
296 end filled up first and there was a bar made, if I can take and show you now where it was—got a mark there if you want to know where it is—there was a bar made that the tide did not go over and grass grew on it, and of course, when the grass grows it forms the sand. It is the sand that blows that makes hills. The ocean never washed up a hill, it washes them down, and if you can get the grass to grow you can form a hill, if you can get it out. Well, that made up and the grass got to growing on it just the same as it is over abreast of the inlet today, and then when this big storm came either in '88 or '89 it carried that hill as we would call it right over into this slough, just forced it right over, carrying it out to sea. It had water on the inside for it to carry it over onto and it stayed there and that's what filled up the slough, that is, so suddenly.

Q. Made a lot of land?

A. Yes, sir, of course it made land, now that's why I say I seen it further out. Now, we walked down Atlantic Avenue onto this bar, walked down below Pacific Avenue on the bar and I don't know that anybody remember—that there was a schooner come ashore there by the name of John Roche and she come ashore on this bar and there was bar enough to go over there and to have a sale and to sell the stuff. They filled the schooner with barrels to float her off and when the tide raised you know and lifted the schooner up and dropped her on the bottom bye and bye the stern flew out just the same as a stopper flies out of a champagne bottle.

Q. Don't know anything about a champagne bottle?

A. No, I suppose not, not in open sight; so of course the barrels all come out you know and the vessel broke in two and I bought half of her for \$1.35. I own a vessel out there. I want you to take her off that ground too. Now, I will tell you where that schooner is. She lays, I think, in the third piling of the pier in front of the Royal Palace that goes out on the dock. That's where she is sunk in the sand.

Mr. Bourgeois: That's your half?

The Witness: My half, yes, sir.

Q. Where is the other fellow's half sunk?

A. I don't know where that went, that went on up to the inlet.

Q. Now, Captain, was there ever any more land than there is now at New Hampshire and Vermont Avenues, so far as you know?

A. Well, I couldn't say that but by being out on this bar and walking down that way and not having any regular mark, nothing more than this vessel and the like of that, and patrolling around on that bar, why of course, I couldn't say, I don't know as it was any further out. There might be five, ten or fifteen out that way or this way, but I think——

Q. You mean this bar, that was out on the outer side of the slough?

A. Yes, sir.

Q. But as to solid land, is there more or less solid land now than there used to be?

A. Oh, yes, there is more, taking it clear into the corner of Pacific.

Q. Yes.

A. Oh, yes.

Q. Has there been a steady gain of ground there?

A. There has been a steady gain of ground in there by putting out things to hold it and to make it.

298 Q. Such as jetties you mean?

A. Don't take jetties, I have seen more—I have made more ground in five years than any jetties ever been made yet on the coast.

Q. How do you make that, Captain?

A. Oh, easy, if you are a mind to work, I didn't have any money I had to do the work myself and I done it as I wanted to do it. I tell you how I made it if you want to know.

Q. Well, you tell me at lunch.

Mr. Bourgeois: No, tell us how he makes it.

A. Why I bought a lot on Vermont Avenue. A man sold it to me for nothing, I didn't have a dollar, but if it ever got worth anything I was to pay him \$2,000 for it and I had a man foolish enough to lend me \$2,500 on that lot to build a house, so after I built the house, I built the first house that's built on the water front on piling to live in.

Q. Is that 23 South Vermont Avenue?

A. Yes, sir, that's it.

Mr. Bourgeois: You aren't afraid to use that number?

The Witness: Everybody said I was a fool or crazy, didn't know which.

A. (Continuing:) I wasn't losing any thing, I was losing somebody else's money if I lost it. Well, I built the house and I stepped right off the Boardwalk onto the corner, that's the way I built it. There was 25 by 50 feet of ground out of water at low water, but not at high, right on Vermont Avenue. I built the house
299 three stories high and one story to dig out if I wanted to, underneath, and let the water come on through, so as not to interfere with my foundation. I built it like a photograph gallery with hooks, hooked it up, and then it got to making up a little and in the winter time when it froze, I put a sail on a wagon and went northwest—I used to go up to Baltic Avenue and along there and haul down trash and fetch it down easier than a horse working, fetch it down, dump my load and go back and get it. I done that at nights when a good many people was asleep. Well I built up a brush the full length of my lot and — about five years I had a sand hill from fifteen to twenty feet high in front of my house, that is in front of the back of it. I sold \$450 worth of sand out of that sand hill and kept a raising more from the foundation. That's the way to build sand hills. I got the grass started and the sand blowed in there off of somebody else's land and I ketched it, but now of course, they build jetties to ketch somebody else's ground, that's the way to build sand hills.

Q. Captain, I think that's all. Or just a moment, will you show on the map where this house was that you built, is it the house marked on Exhibit D13, marked T. H. Parker?

A. No, 23.

Q. South Vermont Avenue?

A. No, 25, yes, sir—no, that's the last house I built, this is the one I built on the piling.

Q. No. 23?

A. Yes, sir, now I will show you where that jetty is as long as we are right here. Now, my lot is 200 feet deep, back to there (indicating) and right here is Murphy's house and right there Dr.

Dick built some houses, well 25 feet from that corner is the
300 farthest jetty out which they called Taxis; there wasn't a box put in them jetties; it is eight by ten wood, pine plank and bolted right down through and then filled with stone and the first one comes out about there and we run planks from here on trestles and from here out onto this wall, the stone, to dump them in that square jetty. It is regular square crib like that and bolted through. Well, I took that jetty, from here clear up to this jetty here, I took that by myself and I got a house built of it. I built a whole house frame out of it on Virginia. I framed it up on the beach, marked it out and all myself and this jetty that runs out right under this house now, this house, and that house stands right on the jetty, that runs out, that three by five white pine twenty-five foot long.

Q. Captain, do you happen to know anything about a strand?

A. Well, that's always been—a whole lot of things seems to be in question about water fronts isn't there.

Q. Yes. What do you know about a strand, if anything?

A. Well now, I tell you all that I know about a strand—I have never been on a beach—and I lived in different places. A strand is a term—there is a bird that is called a strand bird, and that bird always lives between high water mark and low water mark. he never runs up on the dry sand to find food because the food don't grow where the water ain't, and it is always called a strand from them two marks, it don't make no difference where the high water mark is—the gentleman said yesterday you couldn't establish a high water mark to save your life to suit two different persons, because a person goes there will take the days when the tide runs fullest, ordinary tides. Tides don't always run ordinary, but the man wants an ordinary high water mark to come up first, that's the month he will take to measure, and a fellow wants it further on, why that will be the month he will take and he will take the tide every day you know but they don't take them on the same month always.

Q. A little foxy work there.

A. Now, that's an ordinary tide of course, is where it really would run every day, but you can take a half a mile right along the beach and you wouldn't find the tide on the same line under ten feet, I don't suppose—it runs like this.

Q. Well, you were about to say what the strand was, what is it?

A. That's the water between the high water and the low water mark, wherever it may be.

Q. You mean the land?

A. Yes, where it is wet every day for a bird to live.

Q. Is it so understood by the men along the beach?

A. Always has been, my grandfather taught me that. I went aboard of a boat with my grandfather when I was five years old. He was blind, you wouldn't think it hardly, he used my eyes and his feeling. We used to go up to Crow Fairfax. These fellows goes out gunning and fishing knows where Crow Fairfax is in Grassy Bay. We used to go there and clam two weeks and he couldn't see a half way across from Hatfields across to May Marsh. We used to go up there through the thoroughfare and he used to ask me if I seen a certain house over on Leeds Point. I know it is Leeds Point now, but I didn't know it then. He said, "Do you see a house over there with a red roof on it and a big tree with big bushes on top of it?"

Well, he would go up and he would say, "Is that the house and the tree come in range?" And for him to know he would put his two fingers up that way, so we would go on up through the bay until these trees come in range. That was to throw him up far enough to keep him clear of the sand bars in the lower part of the bay—go across there just as well as a man with eyesight. That's the way he used to do down in the Bay Marsh. That's what we always termed a strand is where these birds feed. I can take you to my house now and show them to you every day.

Q. Well, was the term used in that sense by the men along the beach?

Mr. McCarter: If he knows.

Q. If you know?

A. Sir?

Q. Was the term strand used in that way by the men along the beach?

A. Yes, sir, yes, sir.

Q. That's what they understood and what you understood?

A. Yes, sir, if you went over on the beach and you found anything they asked you where you found it, "I found it along the strand," if you found it up above high water mark they wouldn't let you take it. Down in Maine today you can't.

The Court: Is that all?

Mr. Carr: That's all.

No cross-examination.

303 Mr. ASHMEAD recalled.

Direct examination.

By Mr. Carr:

Q. Mr. Ashmead, I show you Exhibit P5 being a map of Atlantic City, made in 1876, being a copy of such a map, and call your attention to two dotted lines nearly parallel with each other, the one marked low water line in 1852, the other high water line of 1852, and I ask you whether in any of your searches or examination of records or maps, you have ever before seen or heard of high water line and low water line of 1852, as depicted on this map?

A. Never.

(Objected to.)

A. (Continuing:) I never have except on the map——

The Court: Wait a moment, why Mr. McCarter?

Mr. McCarter: What does that prove?

The Court: Well, it tends to negative that the location of the high and low water mark of 1852, as on this map, is a correct location. It may be that this map will be evidence of the high and low water mark of 1852, if the statute is broad enough to make it so.

Mr. McCarter: Yes, sir, I understood that, but the fact that he has not found any data or any proof that shows such a thing, does that negative this?

304 The Court: It is evidence that tends to negative it because it is entirely clear that the person who made this map in 1858, in showing the high water line and low water line of 1852, must have had resort to some hearsay evidence or data or something or another of that kind. Now, this witness has made a study of the

conditions in Atlantic City, the topographical conditions in Atlantic City for a number of years, and it seems to me that if he could find any data upon which that line could be based that it is evidence of the fact that that is a mislocation of the line.

(Question repeated.)

Mr. McCarter: Well now, I should think that those documents that he has seen and inspected should be produced. He is giving us his recollection of what certain documents indicated.

The Court: Strictly speaking that might be so, but that becomes quite impossible of course. I will take the evidence for the purpose for which it is offered.

(Plaintiff's counsel asks an exception which is hereby allowed and sealed accordingly.)

(Sealed.)

A. I never have except on the map from which this is a copy that is there are a number of those maps, I have one down in the office.

Q. And the map from which this is copied is a—

A. Lithograph map, I have one of those lithograph maps.

Q. And did you ever attempt to verify those lines and see
305 whether there was anywheres any record of such high and low water lines?

A. I have.

Q. With what success?

A. Low water line—the low water line on their map, as it is shown on the Rowand map, but the high water line is not shown on the Rowand map. I have never seen any high water line shown except on this map.

Q. You have made a great many surveys for the riparian commission, haven't you, in this locality?

A. Yes, sir.

Q. And you are familiar with the data which the riparian board has?

A. Yes, sir.

Q. Dealing with this particular beach?

A. Yes, sir.

Q. And you are familiar with the records in the secretary of state's office dealing with the same?

A. Yes, sir.

Q. And in the surveyor general's office?

A. Yes, sir.

Q. And in the Atlantic County offices, are you not?

A. Yes, sir.

Q. And have you looked in all those places?

A. I have.

Q. And you don't find any record of high water mark?

A. No, sir.

The Court: Who made the lithograph map which you speak of?

The Witness: Well, it has Thomas B. Garrett's name on it. He is a man did some little surveying down in Atlantic City.

306 The Court: When?

Mr. McCarter: If you know.

The Witness: Well, I remember when he was there, must have been along in the seventies, he lived in Atlantic City a number of years.

Q. Did he do much in the way of surveying down there?

A. Not very much, no, I don't think he did very much surveying.

Q. Do you know whether he was recognized as a high class surveyor.

(Objected to. Objection sustained.)

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Ashmead, assuming for the purposes of our case that this does represent the difference between the high and low water line and that this map is a thousand feet to the inch, what would be the approximate distance at New Hampshire Avenue between high and low water mark?

A. Do you want this on the line——

Q. At right angles with the tide?

A. About 150 feet.

Q. And right on the point there it is a little wider than that, how much is it there?

A. About 200 feet.

Q. Now, take the same map on the point, made in 1876, when the survey was made, this particular survey, and show me what it is between high and low water mark there, right on the point,

307 that's down about North Carolina Avenue I think?

A. About 200 feet at North Carolina Avenue.

Q. That's the extreme point of the beach at that time, isn't it?

A. It seems so.

Q. Now, let me ask you, the street system was put on the dedication map by Osborne, that's your understanding?

A. I heard so, I don't know, of course.

Q. And Osborne was the civil engineer of the Camden and Atlantic Avenue was he not?

A. Yes.

Q. Now, would it not have been entirely feasible for him to have measured when he put the street system on there, the distance between high and low water mark, and wouldn't it have been entirely feasible for Mr. Garrett to have gotten from Mr. Osborne the difference between high and low water mark?

(Objected to as simply asking this witness to guess.)

The Court: Yes, that is too conjectural, the question is overruled Mr. Bourgeois.

Q. When did Mr. Osborne die, if you know?

A. I don't know.

Q. Mr. Ashmead, has the high water mark ever been further oceanward than it is today, up at New Hampshire Avenue? Mr. Carr has asked that question about a dozen times.

A. Well now, of course, I don't know. As far as my recollection goes why it never has been.

Q. Well now, let me refresh your recollection, if I may.
308 At the present time it runs up to the Boardwalk, doesn't it?

A. Yes.

Q. I show you a map and ask you if you made that map?

A. Well, this is a map made in Ashmead & Hackley's office.

Q. Now, where was the high water line in 1907?

A. Just a few feet outside the Boardwalk.

Q. How many feet outside, right here at Vermont Avenue, how much outside the Boardwalk at Vermont Avenue?

A. Of course, in the first place, the Boardwalk has been widened out twenty feet.

Q. I know that, we will get to that after a while.

A. Take it at Vermont Avenue, what's the question?

(Question repeated.)

A. Fifty feet as shown on this map, but that is not fifty feet outside of the Boardwalk, as it is now.

Q. Yes, all right, don't be afraid to answer, you won't get in any trouble. Now, at New Hampshire Avenue how much is it outside?

A. Twenty feet, that is twenty feet as shown on this map.

The Court: Mr. Ashmead has already testified that the high water mark was further in 1907 than at the present time. He has already testified to that and marked it on this map.

The Witness: At New Hampshire Avenue.

The Court: Never mind that, we have covered all that.
309 Mr. Bourgeois: I would like to offer this map in evidence.

(Received and marked Exhibit P36.)

Redirect examination.

By Mr. Carr:

Q. Mr. Ashmead, did you at my request attempt to show, physically, to outline a description in the deed from Stern to Nirdlinger, July 17, 1912, recorded in Book 486, page 447?

A. I did.

Q. Will you mark on Exhibit DS as nearly as you can the outlines of the description contained in that deed?

Mr. Carr: The stenographer need not take this.

(Mr. Carr reads description down to the point where it says 770 feet more or less and so forth.)

A. Now, that course, I cannot tell where it goes without having the high water line of 1856. Somewhere there (indicating a point).

Q. Can you put even an approximate location?

Mr. McCarter: How can he "right angles to high water line" he don't know what that is. Now, I don't think that exhibit ought to be filled up with hypotheses.

A. (Continuing:) Now, it begins at the southeast corner of New Hampshire and Dewey, runs east along the south line of
310 Dewey 190 feet parallel with New Hampshire 350 feet to the high water line of April, 1903. Then it runs east or easterly at right angles to the line of 1856.

Mr. McCarter: Way out here. Out——

A. (Continuing:) Out here according to the distance 770 feet. Then the next distance is not given, down to New Hampshire Avenue.

Q. Well, at any rate, it makes right angles in an easterly direction?

A. It is a right angle to this line, if you knew where that line is.

Q. Connecting from that line to here?

A. Yes.

By Mr. McCarter:

Q. May I ask you a question, is it your idea, referring now to Exhibit D8, that the high water line as you construed it on D8, jumped between 1852 and 1856 as much distance as you would indicate in portraying the deed you have just undertaken to describe?

A. I don't say on the map that that's the high water line.

Q. Well, didn't you construe——

A. Yes, I believe it was in fact.

Q. Your construction of the line of outside sand hills is the high water line, isn't it?

A. Yes, in this particular point?

Q. One moment please. Now, do you wish now to have the Court think that the high water line jumped away out further than the riparian commissioners' exterior radius as shown on Exhibit D8, between 1856 and 1852?

311 A. Yes; I don't believe it was ever out there in 1856.

Q. Well, then didn't the description that you have just drawn bring you out there?

A. Yes, it says to the high water line.

Q. 1856?

A. Gives the distance 770 feet.

Q. That would bring it where?

A. Brings it out to this line.

Q. Way down here to the foot of the arrow on D8, how far?

A. 450 feet outside of the riparian commissioners' line.

Q. How far is that by scale from your assumed line of high water in 1852?

A. 1,200 feet or 1,100 feet.

Q. 1,100 feet. Well, is it your judgment that the high water line jumped 1,100 feet between 1852 and 1856?

A. No, but I don't believe the high water line was ever out there in 1852.

By Mr. Carr:

Q. Mr. Ashmead, was your answer simply upon the assumed accuracy for the purpose of the question, of the description contained in the deed which I referred you to?

A. I don't just understand your question.

Q. Don't understand it myself. Strike it out. In your answer to my question referring to deed reported in Book 486, page 447, did you wish to be understood as locating yourself the high water mark where indicated in that deed?

A. I undertook to locate it as described in that deed.

312 Q. But if that description——

A. Say 770 feet from a certain point, therefore that's 300 feet south of Dewey, then runs out easterly 770.

Q. In other words you simply attempted to show the outlines of the description in that deed?

A. As described in that deed.

Q. You did not attempt to stand sponsor for the high water mark being where the deed said it was?

A. No, sir, I don't think it was there.

By Mr. Bourgeois:

Q. Are you enabled by that description to say where it went? That says easterly to a certain boundary.

A. Yes, to the high water line of 1856.

Q. Did you consider that to mean directly east or in a easterly direction?

A. No, I don't think that's what it means, I think it is easterly because it gives the course, says it is at right angles to the high water line.

Q. Now Mr. Ashmead, I call your attention to Exhibit P5, and assuming that the line of 1852 is correctly delineated on that map, that's the water line, also assuming that the water line of 1870 is correctly delineated on that map, then it follows that the point of the beach and the line of 1852 had been washed away sometime between that and 1876?

A. Yes.

Q. Do you know whether it was washed away between '52 and '56 or not?

A. Not of my own knowledge, no.

Q. But some part of it may have been washed away?

A. Yes, I wasn't there.

313 Q. But if any part of that shore washed away, you don't know how far in that washed?

A. No.

Q. And you don't know what direction the high water mark took in 1856?

A. No.

Q. May have been at right angles to New Hampshire, may it not?

A. Might be.

Q. And it might be that that course would have followed practically down New Hampshire and struck the high water line of 1856 or 770 feet distance?

A. Might have gone almost anywhere, any course.

Q. Mr. Ashmead, you used to be city surveyor, didn't you?

A. Yes.

Q. Will you tell us if Atlantic City did adopt this dedication map as its street system?

A. It did.

The Court: Mr. Ashmead, just indicate if you can, roughly on this map D8, where the low water line shown on the dedication map D9 is.

The Witness: At that point.

The Court: At the point in question here where that bulged out.

The Witness: Here is New Hampshire Avenue 1,065 feet is about what it is. It comes to the edge of the paper.

The Court: Well then, the low water mark as shown on 314 the dedication map would be at the extreme bottom of the paper D8 and bend around to the right—

The Witness: On a curve, curving to the north.

The Court: So as a matter of fact, in 1852 all of this land here was high land or upland?

The Witness: That is—no it was land between the high and low water mark.

The Court: Or land between the low water mark and the line of the sand hills as the case may be.

The Witness: Of course, we don't know where the high water mark was.

The Court: I see. The point marked by the witness is marked D. Then it would come up in this direction?

The Witness: Yes, that's right about the way you have it.

(The course marked by the witness is marked D—D.)

The Court: Have you finished the proof?

Mr. Carr: Yes, except we want the opportunity to authenticate the two geodetic survey maps.

(Hearing adjourned for argument, to Tuesday, October 30, at 10.30 A. M., at Jersey City.)

October 30, 1917.

Case Continued.

Mr. Carr: Before proceeding to the argument of the case, I wish to ask permission to amend the defendant's answer, in the form indicated in an order, which I now present.

(After discussion with counsel.)

The Court: It appearing that the purpose of the amendment is to set up one of the claims upon which the defendant rests its claim to title to the property in question, and as counsel for the plaintiff frankly admit that assertion of this claim, at this late date, in view of the evidence taken, will not unduly prejudice the plaintiff, I will permit the amendment to be made, upon the understanding that the proofs heretofore offered in respect to the conveyances made, in and about the property in question, and which were embodied in the testimony of Mr. Barrett, shall not be here, or in any other court, objected to as incompetent to prove the facts which he testified to. In other words, his testimony as to the fact of the conveyances and the way in which they were to be made, is to be accepted in lieu of the production of the actual deeds or certified copies thereof.

(The stipulation on page 206 of the transcript is, by consent, amended as follows: After the word, "made" in the 4th line of the stipulation shall be added: "excepting the conveyance from Bartlett to Stevens, which conveyance conveyed upland and also lands under water.")

316 (Plaintiff's counsel offers in evidence abstract of the title from the State to Walter Barrett for riparian grant; conveyance from Walter Barrett back to Stevens the defendant; and also the various conveyances made by Stevens of the lands on the western side of New Hampshire Avenue and immediately adjoining it.)

(Defendant's counsel withdraws from the files of the case, Exhibits D10 and D11 for identification to have certified at Washington, when they will be returned to the files of the case for use as exhibits.)

EXHIBIT D.

United States District Court, District of New Jersey.

In Equity.

SAMUEL F. NIRDLINGER, Plaintiff,

VS.

HENRY E. STEVENS, JR., Defendant.

Opinion.

Suit to Quiet Title of a Certain Parcel of Land in Atlantic City, New Jersey.

On Final Hearing.

George A. Bourgeois and Robert H. McCarter for plaintiff.
Wilson & Carr for defendant.HAIGHT, *Circuit Judge*:

This suit is primarily instituted under an Act of the New Jersey Legislature entitled "An Act to compel the determination of claims of real estate in certain cases, and to quiet the title to the same." (4 N. J. Compl. Stat. 5399.) The bill also contains allegations which, it is claimed, bring the suit within the general quia timet jurisdiction of a Court of Equity, irrespective of the statute. Accordingly it prays for a decree removing a cloud upon the title of the plaintiff to the land in question, alleged to have been created by a certain riparian grant made by the Riparian Commissioners of the State of New Jersey, for a decree establishing that the defendant has no estate or interest in the land; and for a decree fixing and settling the rights of the parties therein. Some-
318 time prior to the institution of this suit the present plaintiff and a corporation known as the Dewey Land Company, being at that time tenants in common of the land in question, brought a suit in the Court of Chancery of New Jersey under the same statute against the same defendant and therein sought the same relief in respect to substantially the same property as is sought in the present suit, except that the prayer for relief in the bill in the former suit did not, as does the bill in the present suit, specifically pray for the removal of the before mentioned alleged cloud upon the title. The former suit was duly prosecuted and resulted in a decree dismissing the bill. Upon appeal, the Court of Errors & Appeals of New Jersey affirmed the decree of the Court of Chancery. The plaintiff subsequently and prior to the institution of the present suit acquired the interest of the Dewey Land Company.

1. Naturally the first question which is raised is whether the decree in the former suit is res adjudicata of the issues in the present suit and a bar to the prosecution thereof. In solving that question, the decree actually made and the grounds upon which the same was rested by the respective New Jersey Courts must be considered in connection with the statute under which the bill was filed. The statute was originally passed in 1870 (P. L. 1870 p. 20), and, as set forth in the title, its purpose is not only to quiet titles but to compel the determination of claims to real estate in certain cases, viz., these where one is "in peaceable possession of lands * * *

claiming to own the same and his title thereto or to any part thereof is denied or disputed, or any other person claims a

319 is claimed to own the same or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title claim or encumbrance." (Sec. 1, 4 Compl. Stat.) As is pointed out by Vice Chancellor Stevenson in *Fittichauer vs. Metropolitan Fire-Proofing Company*, 70 N. J. Eq. 429, 430, takes care of

"those cases of hardship where the defendant out of possession makes a claim while the complainant in possession has no means of compelling the defendant, either at law or in equity, to submit his claim for determination, and thus have it either established as valid or finally declared void. The great object of the statute is not to afford the complainant a new means of asserting and establishing his title, but to afford the complainant a means of compelling the defendant to either abandon or establish his title, or have it decreed invalid."

As is indicated in the last quoted remarks, the Act provides for those cases where the defendant may disclaim all interest in the land, but provides that if he shall answer, claiming any interest therein, he shall in his answer specify and set forth the same, as well as the manner in which and the source through which it is claimed to be derived. These provisions have been construed by the Courts of New Jersey to constitute an answering defendant the real actor in the suit—the plaintiff—so that he must not only set forth in his answer but must maintain by proofs any adverse title or claim which he asserts; and the actual complainant in the suit is under no obligation

to exhibit his own title until after the defendant has shown
320 his, being required in the first instance to merely establish the jurisdictional facts, viz., that he is in peaceable possession, claiming to own the lands, and that no suit is pending in which the defendant's claim, whatever it may be, can be tested. *Fittichauer vs. Metropolitan Fire-proofing Co.*, supra; *Ocean View Land Co. vs. Loudenslager*, 78 N. J. Eq. 571 (Ct. of E. & A.).

In furtherance of the object of the statute, as expressed in its title, it is provided that when a defendant has answered setting up his claim, except in cases where either party has applied for the framing of an issue at law and a trial thereof by a jury, (with which features of the statute we are not concerned in this case).

"The Court of Chancery shall proceed to inquire into and determine such claims, interest and estate, according to the course and practice of that Court; and shall * * * finally settle and adjudge whether the defendant has any estate, interest or right in, or encumbrance upon said lands, or any part thereof, and what such interest, estate, right or encumbrance is, and in or upon what part of said lands the same exists." (Sec. 5.)

It is further provided in Section 6 that

"The final determination and decree in such suit, shall fix and settle the rights of the parties in said lands, and the same shall be binding and conclusive on all parties to the suit."

The statute, therefore, specifically directs that the final decree in the cause shall (1) finally adjudge whether the defendant has any interest in the property and if so, exactly what it is; and (2) fix and settle the rights of the parties. No other decree is provided for in the statute; nor, except in cases where the complainant has failed to establish the jurisdictional facts of peaceable possession, etc., or something kindred thereto, would any other kind of decree seem to be permissible. In the latter class of cases there must necessarily be, as in practice there has been, I think, a decree simply dismissing the bill. See *Steelman vs. Blackman*, 72 N. J. Eq. 330 (Ct. of C.) and *Oberon Land Co. vs. Dunn*, 60 N. J. Eq. 280 (Ct. of C.). It is thus apparent that in a decision on the merits the ascertainment and settlement of the defendant's interest is the primary and absolutely essential requirement of the statute. The decree of the Court of Chancery of New Jersey in the suit which is set up as a bar to this suit was simply that the complainant's bill be dismissed. No attempt was made to adjudicate the defendant's interest or to settle the rights of the parties in the land. That decree was merely affirmed by the Court of Errors & Appeals; it was in no respect ordered to be modified or changed. The decree of the Court of Chancery (as appears from the unreported memorandum filed by the Chancellor) was based on the conclusion that as the defendant asserted a claim based on a riparian grant of the State made through the Riparian Commissioners, and as the validity of the grant could not be attached collaterally, but only by a direct proceeding instituted for that purpose by or in the name of the Attorney General, the bill, which was held in effect to be such a collateral attack, could not be maintained. The Court of Errors & Appeals disagreed with the ground upon which the Chancellor had dismissed the bill, and held that the complainants might maintain their bill "if they have made out their title." (*Dewey Land Co. vs. Stevens*, 83 N. J. Eq. 314, 316). The Chancellor's decree of dismissal, however, was affirmed on the ground that the deeds, upon which the complainants relied to establish their title, conferred, in fact, no title upon them. Mr. Justice Swayze remarking at the conclusion of his opinion—"We think the complainants fail to establish the title set up in the amended bill; the decree of

dismissal must therefore be affirmed." What, therefore, has the New Jersey decree specifically established and settled? Nothing, it seems to me, but that the complainants in that suit had not established facts sufficient to warrant the relief prayed for in their bill authorized, by the statute, to be given. It established nothing more, for instance, than it would have established had the complainant's bill been dismissed because they had failed to establish that they were in peaceable possession of the locus in quo, as in *Steelman vs. Blackman*, supra; or, as in *Oberon Land Co. vs. Dunn*, supra, because the parties had by their own act made it impossible for the Court to carry out the direction of the statute and by decree fix and settle the rights of the parties in the lands. But it is urged on behalf of the defendants that although the decree did not in form do so, it has actually settled that the defendant's title is superior to that asserted in that suit by the complainants. This contention is based on the proposition that because under the statute, as hereinbefore construed, it was incumbent upon the defendant in the first instance to assert and prove his title before the complainants were called upon to reveal theirs, the Court of Errors & Appeals must have found the defendant's prima facie title, which rested upon the state's riparian grant, was superior to that asserted by the complainants, otherwise the Court would not have affirmed a dismissal of the bill. But this is a non-sequitur. It may be that that decision has established

323 a new jurisdictional requirement, viz., that the plaintiff must establish some kind of title to the land in controversy before the defendant is required to set forth and establish his claim; and in the event of his failure so to do, the Court is not at liberty to entertain a bill filed under the statute in question. On the other hand, its action in merely affirming a dismissal of the bill may have been due to the fact that upon examining the record, it found that the deeds relied upon by the complainants conferred no title upon them, and, consequently, it adopted a practical and convenient way of disposing of the case, and thus rendering it unnecessary for it to determine whether or not the defendant had any interest in the lands; and, hence, it advisedly merely dismissed the bill; the complainants being treated rather as interlopers without a shadow of title. That in a suit instituted under the statute in question, if the decree fixing and settling the rights of the parties in the disputed premises is appealed from and is reversed, the Court of Errors & Appeals must direct what decree is to be entered, is recognized in that Court in *Blackford vs. Conover*, 40 N. J. Eq. 205, 218. Therefore, the Court of Errors & Appeals in the New Jersey suit had intended to fix the rights of the parties in the land in question, it would have remitted the record to the Court of Chancery, with direction to enter such a decree as would have fixed those rights as it adjudged them. I would be loath indeed to hold that a decision in a former case is res adjudicata upon a mere speculation as to what another Court may have meant to decide, especially when its actual decree or judgment is not in harmony therewith. Nor in my judgment is there anything in the opinion of the Court, which was written by Mr. Justice Swayze (a "concurring" opinion having also been

224 written by Judge White), which would justify such a conclusion as defendant contends for. In approaching the discussion of this point, it seems advisable to refer briefly to some of the facts. The locus in quo, which for all practical purposes is the same in this case as it was in the New Jersey case, is situate in Atlantic City, New Jersey, and borders on the Atlantic Ocean. It probably can best be described, and other matters, which it becomes necessary to hereafter discuss, can best be understood, I think, by reference to the following diagram, which is made for convenience of reference to conform as nearly as possible to that in Judge White's opinion in the Dewey Land Company case. It is not drawn to scale.

(Sketch.)

The locus in quo is the triangular piece of property lying east of New Hampshire Avenue and indicated by the shaded lines. In 1852 the entire tract shown on the diagram was fast land and was owned by one Robert B. Leeds. In 1856, and apparently after some of the land had been encroached upon by the ocean, he conveyed it to John McClees, describing it as bounding on "the edge of Absecon Inlet." In 1897 McClees conveyed it to the Atlantic City Beach Front Improvement Company, by a description bounding it on the "high-water mark of Absecon Inlet and the Atlantic Ocean." At that time, as appears on the diagram, the land in question was under water, the ocean in the intervening years having moved inward many feet. Whether the land had been lost by erosion or avulsion, I do not at this point attempt to decide. The predecessors in title of both the defendant and the plaintiff acquired their respective titles to the fast land from the Atlantic City Beach Front Improvement Company. In 1900 the immediate predecessor in title of the defendant, William H. Bartlett, who owned the 325 shore front lot marked "B" on the diagram, procured a riparian grant from the State for the land, then under water, included within the dotted lines shown on the diagram. In 1899 and 1900, respectively, the then upland part of the lot marked "D" on the diagram was acquired by the plaintiff's predecessors in title from the Atlantic City Beach Front Improvement Company. Since that time, the shore front by reason of accretions has moved much further oceanward and is now located approximately as shown on the diagram. It is thus apparent that the triangular piece of the lot marked "D"—the locus in quo—is now fast land and is within the bounds of the riparian grant to Bartlett. In 1910 the Dewey Land Company and the present plaintiff, who then were tenants in common of lot "D," as before stated, filed the before mentioned bill in the Court of Chancery of New Jersey against the present defendant to have the latter's interest in the locus in quo determined and settled. In the original bill in that case, the complainants claimed title to the locus in quo by reason of accretions. Subsequently, however, they amended their bill, eliminated all claim based on accretions and rested their title upon quitclaim deeds taken in 1911 from John McClees and in 1912 from the heirs of Robert B.

Leeds, respectively. This was apparently done under a mistaken notion of the effect of a decision rendered by the Court of Errors & Appeals of New Jersey in *Ocean City Assoc. vs. Shriver*, 64 N. J. L. 550. In the deed from the Leeds heirs, the property was described as running to the high-water mark as it existed in 1852, and in the McClees deed as running to the high-water mark as it existed on April 15, 1853. It is important that the title asserted by the complainants in

the New Jersey suit be borne in mind in ascertaining what the Court of Appeals in New Jersey decided in that suit.

As will be seen by reading the opinion of Mr. Justice Swayze (page 316) and the opinion of Judge White (page 656), it was held that neither of these deeds conferred any title upon the complainants to the locus in quo, for the reasons which are very clearly set forth in Mr. Justice Swayze's opinion. It is entirely clear both from Justice Swayze's opinion and from Judge White's opinion that the New Jersey Court did not attempt to determine what rights, if any, any of the parties to that suit had acquired in the land in question by reason of accretions, and Judge White distinctly says that the question as to what rights the defendant had acquired in the locus in quo by virtue of the riparian grant was not before the Court. What better assurance could there be that the Court did not attempt to decide that question? It is true that Justice Swayze said (page 317):

"If the land was formerly fast land, and the title was lost by erosion, it became the property of the State, not merely as long as it remained under water, but, if the State made a riparian grant absolutely. *Stevens vs. Paterson & Newark Railroad Co.*, 34 N. J. L. 532. Whatever right the former owners might have as against private persons upon the ocean receding, was of no avail against the state's riparian grant; the title lost by erosion was then lost forever, unless it was regained by accretion, and the right of accretion was the compensation of the former owner for his loss; each grantee had the same right."

It was these remarks which called forth the opinion of Judge White.

I do not think that they give any warrant for the conclusion that Justice Swayze meant to say that the riparian grant deprived the owner of lot "D" of such land within the bounds of the riparian grant as might thereafter be formed by accretion, if, in other respects, he would be entitled thereto. It is true that he made a broad statement when he said that "it became the property of the State, not merely as long as it remained under water, but, if the State made a riparian grant, absolutely;" but that statement must be read in the light of what he had just been discussing and what he said afterwards. He had just been discussing not the effect of the riparian grant, but of the title, if any, acquired by the complainants through the deeds which they had received from John McClees and the Leeds heirs. I think that his remarks had reference to the devolution, as respects these grantors, of the title to the property embraced within the original Leeds and McClees deeds.

when it or a part of it became covered with water, and later when it became uncovered by reason of accretions. In the succeeding sentence, Justice Swayze said "the title lost by erosion was then lost forever, unless it was regained by accretion." If this means anything, it is a clear limitation upon the broader statement theretofore made. The case of *Stevens vs. Paterson & Newark Railroad Co.* cited by Mr. Justice Swayze simply held that the State of New Jersey is the absolute owner of the land under all navigable waters, below the ordinary high-water line within its limits and can grant such land to anyone without making compensation to the owner of the shore, with the possible exception of the right to "alluvium and dereliction," pointed out in Judge White's opinion in *Dewey Land Company case*. This case did not hold and in fact the question was not involved, that in making a riparian grant of land under water the State could confer a title upon its grantee which would deprive the owner of the ripa of his right to such accretions as might form in front of his land, within the bounds of the grant, before the grantee might have filled in or otherwise reclaimed the land thus granted to him. As pointed out in Judge White's opinion, the Statute of New Jersey under which the grant in this case was made, provides "that before an independent grantee from the State may fill the land under water in front of the land of a riparian owner who has failed to take out a state grant after notice, such independent grantee must extinguish such riparian owner's right to accretions by paying to him the value thereof, to be fixed by the Riparian Commissioners, subject to an appeal to the Supreme Court and a trial by jury." (*Dewey Land Co. vs. Stevens supra*, 659.) Accordingly, it is not to be presumed that Justice Swayze, by the before mentioned broad statement which he made, considering the circumstances under which he made it the subsequent apparent limitation, and what was actually decided in *Stevens vs. Paterson & Newark Railroad Co.*, intended to lay down as an absolute rule that a riparian grant from the State divested the owner of the ripa, when a different person from such grantee, of his right to land formed by accretions before such grantee had reclaimed the land under water thus granted. This will be more manifest, I think, in the light of the general rules, which will hereafter be discussed, regarding the relative rights of the owner of shore front property and the State and the latter's grantee.

Reverting now to the question of the effect of the New Jersey decree and decision on this suit, as before shown, the determination of whether the defendant has any interest and if so, what it is, is the primary and absolutely essential requirement of the statute. A decree or decision which either expressly or impliedly falls short of that requirement necessarily does not dispose of the case on the merits. It is, of course, elementary that for a judgment in one suit to be a bar to the prosecution of another suit between the same parties or their privies, the point in controversy must be determined on its merits, and if the first suit be dismissed for want of jurisdiction or disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar

to the prosecution of another suit. (Hughes vs. U. S., 4 Wall. 232.) Nor is the practical effect of the decree to bar the present action because of the rule that a judgment on the merits is *res adjudicata* not only as to any matter which was offered to sustain or defeat the claim in controversy, but as to any other matter which might have been offered for that purpose; in other words, I do not think that the fact that the plaintiff in this suit did not assert, with his co-complainant in the New Jersey suit, the title upon which he now relies to defeat the title set up by the defendant, precludes him from now asserting it. That rule has no more application to this case than it would have to a judgment of involuntary non-suit rendered in an action at law, which is based upon the failure of the plaintiff to establish facts entitling him under the law to relief. Such a judgment of course, does not preclude the plaintiff from supplying in a subsequent action facts which he might have supplied in the first action and which would have made out a case entitling him to relief, if not sufficiently answered by the defendant. (Manhattan Life Insurance Co. vs. Broughton, 109 U. S. 121; Beckett vs. Stone, 60 N. J. L. 233.)

23 Cyc. 1136 and cases there cited.) I accordingly conclude that the New Jersey decree is not *res adjudicata* of the questions in this case. If a contrary conclusion were reached there would be presented a situation where, although the title or interest of the defendant had never been settled, neither party would ever be able to procure a decree under the statute, setting at rest the title to the land. Indeed, the practical effect would be to confirm the defendant's claim of title to land of which the complainant was actually in peaceable possession, not because it had ever been so decreed by any Court, but because in a previous suit the complainant had failed to establish his title. Such a result should, of course, be avoided if possible. This conclusion has made it unnecessary for me to consider whether the fact that the bill in the present suit seeks, quite independently of the statute, to remove a cloud upon the title or whether the fact that the premises in question in this suit do not include the part which was in question in the former suit, viz., the part beyond the present high-water line, has any effect on the question under discussion. As no claim is made in the present suit on account of the deeds upon which the plaintiff and his co-complainant relied in the New Jersey suit, the effect of that decision as respects any question which might have arisen in this case because of these deeds, need not be considered.

2. It is conceded that the plaintiff is in peaceable possession of the land in question, claiming to own the same, and that no suit is pending to test the validity of the title or claim asserted by the defendant; consequently, the jurisdictional facts required by the statute are present. It is also apparent that the plaintiff is without an adequate remedy at law. As he is in peaceable possession of the land

he cannot institute an action in ejectment, and no suit is pending at law wherein the validity of his title and the claim of the defendant can be tested. Under these circumstances it is entirely clear that not only has this Court jurisdiction to enter

tain the bill in this suit and thus administer the New Jersey statute, but that it is its clear duty to do so. *Holland vs. Challen*, 110 U. S. 15; *Reynolds vs. Crawfordsville Bank*, 112 U. S. 405; *Chaplin vs. Brower*, 114 U. S. 158; *Wehrman vs. Conklin*, 155 U. S. 314. In all of these cases, statutes in no material respect different from the New Jersey statute were administered in the Federal Courts. In the last cited case, it was held that such a state statute could not be administered by a Federal Court where the plaintiff had an adequate remedy at law.

3. I am now brought to a consideration of the case on its merits. Both the plaintiff and the defendant claimed to *owe* the locus in quo. The defendant's claim is based both upon the riparian grant from the State and upon accretions to the fast land, of which his predecessor in title was the owner at the time of the riparian grant and of which the defendant is now the owner. The plaintiff's claim of title is likewise based upon accretions to the upland, of which he and his predecessors in title from time to time have been the owners. He also makes claim under the doctrine pertaining to avulsion. The first question on this phase of the case is whether the riparian grant to the defendant's predecessor in title, in and by itself, has conferred any title on the defendant to the locus in quo, in view of the fact that it is now fast land and was not reclaimed by the State's grantee before the accretions had formed it. The solution of that question necessitates the ascertainment of the relative rights of the owner of short front property and the State and the latter's grantee. For all purpose necessary to be considered in this (there are some differences), the rights of the State of New Jersey to lands under navigable waters are the same as those which before the revolution were vested in the Crown of England; the title to the soil beyond the ordinary high-water line being formerly vested in the Crown and since the revolution in the State. (*Bell vs. Gough*, 23 N. J. L. 624, 655; *Stevens vs. Paterson & Newark Railroad Co.* *supra*; *Paul vs. Hazelton*, 37 N. J. L. 106; *Hoboken vs. Pennsylvania Railroad*, 124 U. S. 656. It was the rule of the common law, as it is the rule in New Jersey and elsewhere so far as I know, that as the high-water line shifts from time to time due to erosion, accretion or reliction, the Crown's or State's inland boundary and the outward boundary of the riparian proprietors respectively, shift, so that both are ambulatory, and depend from time to time upon the location of the high-water line. *The King vs. Yarborough*, 3 Barn. & Cress. 91; *In Re Hull & Selby Railway*, 5 M. & U. 325; 151 English Reports (Full Reprint) 139; *Camden & Atlantic Land Co. vs. Lippincott*, 45 N. J. L. 405 (Sup. Ct.); *Ocean City Assoc. vs. Shriver*, 64 N. J. L. 550, 554; *New Orleans vs. U. S.*, 10 Peters 706, 716; *County of St. Clair vs. Lovington*, 23 Wallace 46; *Gould on Waters*, Sec. 155, and cases there cited.) On principle, it would seem to necessarily follow that the State's grantee can acquire no greater rights than the State itself had. If, therefore, the State's inland boundary is ambulatory and it has no title to lands formed by accretions, its grantee can have

none, and must merely acquire a like boundary. The author so hold. I am not now speaking of the right of a grantee under the New Jersey Statute to fill in and reclaim land under water conveyed to him by the State's Riparian Commissioners, upon compensating the owner of the upland, because that right rests on, as I take it, an entirely different principle, viz. that of eminent domain. The leading case on this point is *Scrutton vs. Brown*, decided by the Court of King's Bench in 1825 and reported in 4 Barn. & Cress. 485. One of the questions in that case was whether a conveyance of certain property, lying between high and low-water marks, acquired originally by the grantor from the Crown, conveyed that which from time to time, as the sea encroached upon or receded from the beach, lay between the high and low-water marks or only that which at the time that the deed was made was bounded by the then high and low-water marks. It was held that as the high and low-water marks shifted, the property conveyed by the deed also shifted. In the course of his opinion Judge Bayley said (page 498):

"The question here is, whether there may be a certain quantity of land shifting in situation and vesting in the same persons at different times? That must be the case of land fronting the sea or a river, where, from time to time, the sea or river encroaches or retires. If the sea leaves a parcel of land, the piece left belongs to the persons to whom the shore there belongs. The land between high and low-water marks originally belonged to the crown, and can only vest in a subject as the grantee of the crown. The crown by a grant of the sea-shore would convey not that which at the time of the grant is between the high and low-water marks, but that which from time to time shall be between these two termini. When the grantee has a freehold in that which the crown grants, the freehold shifts as the sea recedes or encroaches. Then what was the object of the parties to the deed of 1773? To grant the land within certain limits. Those to the east and west were ascertained, but those on the north and south were to be ascertained by the high and low-water marks. I think that these words must be construed with reference to the rule of the common law upon the subject of accretion, and that as the high and low water-marks shift the property conveyed by the deed also shifts."

The above rule and the authority of *Scrutton vs. Brown* is approved by the Court of Appeals of New York in *Trustees etc. of East Hampton vs. Kirk*, 84 N. Y. 215, as it is also by the Circuit Court for the Southern District of New York in *De Lancey vs. Wellbreck*, 113 F. 103; in which latter case it was applied in construing a riparian grant of land under water originally made by the British Crown and subsequently sold by the State of New York for failure to pay the rents provided for in the grant. The same principle is recognized by the U. S. Supreme Court in *The County of St. Clair vs. Livingston*, *supra*. It will be noted that at the beginning of the opinion in that case (page 62) Mr. Justice Swayze said: "We shall assume for the purposes of this opinion, that all the title which could

passed by Congress and the State was and is vested in the plaintiff in error." *Seratton vs. Brown* is cited with approval by the New Jersey Courts in *Camden and Atlantic Land Co. vs. Lippincott*, supra; and *Ocean City Land Co. vs. Shriver*, supra, although the precise point now under discussion does not seem to have been involved in either of these cases. Indeed, I think that this rule is recognized by Justice Swayze in the *Dewey Land Company* case because, as before noted, he said: "Title lost by erosion was then lost forever, unless it was regained by accretion."

It is expressly adopted by Judge White in his opinion. Consequently, I have no hesitation in reaching the conclusion that if the plaintiff, by virtue of owning lot "D," is otherwise entitled to the land formed by accretions within the locus in quo, the riparian grant in question conferred no title thereto on the defendant.

The next inquiry then is whether the complainant or the defendant, by reason of being respectively riparian proprietors of the upland, is entitled to the accretions which have formed the locus in quo. On this point, the decisive question is how the lines of their respective properties, so far as including accretions is concerned, should run: whether they should follow exactly or approximately the lines of the riparian grant or whether they should follow lines parallel to New Hampshire Avenue.

This question is by no means free from difficulty. The division of lands formed by accretions among co-terminous riparian proprietors and of lands between high and low-water marks when the title thereto is not vested in the State, as in Massachusetts, has always been a perplexing question and the subject of considerable discussion in the Courts. While I have examined a great many authorities, it would, I think, serve no useful purpose, but would unduly and unnecessarily burden this opinion, to attempt to review them. It is impossible, and the Courts have heretofore so recognized, to formulate a general concrete rule by which all cases can be governed, because of the many varying conditions which each case presents. The fundamental principle, however, which underlies

all the cases is that the division should be equitable and fair according to the conditions of each particular case. In ascertaining what is equitable in any given case, except possibly in some of that class where the actual or presumed agreement of the parties or their predecessors in title has been considered as the decisive factor. (See for instance *Adams vs. Boston Wharf Co.*, 10 Gray, 521, 530) the Courts have been primarily governed by the general rule announced by Chief Justice Shaw in *Deerfield vs. Arms*, 17 Pick. 41, 45; as follows:

"Two objects are to be kept in view, in making such an equitable distribution: one is, that the parties shall have an equal share in proportion to their lands, of the area of the newly formed land, regarding it as land useful for the purposes of cultivation or otherwise, in which the value will be in proportion to the quantity; the other is to secure to each an access to the water and an equal share of the river line in proportion to his share on the original line of the water, regarding such water line in many situations as particularly

useful for forming landing places, docks, quays, and other accommodations, with a view to the benefit of navigation, and such constituting an important ingredient in the value of the land.

That case was specifically approved by the U. S. Supreme Court in *Johnson vs. Jones*, 1 Black, 209, 222. While in *Delaware Lackawanna & Western Railroad vs. Hannon*, 37 N. J. L. 276, the case was not directly involved the question of the division of alluvion between co-terminous riparian proprietors, yet the question which was before the Court was for all practical purposes the same. The case was decided in accordance with the same principle; Chief Justice Beaseley thus expressing it, viz:

337 "It is not probable that any precise formula applicable to every case, can be devised. The principle to work on is, that when practicable, each owner is to have his own shore front; when this is not practicable, he is to have his ratable part of such short front. I do not see how the rule can be further specialized.

In the application of these general principles to particular cases various concrete rules have been adopted. In some cases, it was found that inequalities would result if the side lines separating the upland holdings of the various riparian proprietors were extended over the newly formed land, because of the contour of the new shore front or because of the direction in which the side lines approach the old short front, and for other reasons; while in other cases, it was held that the extension of side lines would divide the new shore front and the newly formed land equitably between the adjoining owners. In still other cases, where the old shore front was in a corner, another method of division was adopted; and in some cases, the side lines have been run perpendicular to the old shore front, etc. A collection of the cases will be found in the foot note of 21 L. J. A. 776 and 25 L. R. A. (New Series) 257; see also Gould vs. Waters, Sections 162-165. But there is still another rule (hereinafter referred to as a possible exception to the general rule) which rests upon and gives effect to the actual or presumed agreement (which may be found from acquiescence or conduct) of the owners (either the present owners or some of their predecessors in title) of the upland as to the boundary lines of lands between high and low water marks, to which they, respectively, are or may become entitled as owners or otherwise. It was upon that ground that the decision

338 of the Court of Chancery of New Jersey in *Stockham vs. Browning*, 18 N. J. Eq. 390, was based. The facts in that case in several important respects are so nearly analogous to the facts in the case at bar as to make the case an important authority. The last mentioned rule has been most frequently applied by the Supreme Court of Massachusetts in the division of the flats (the shore between high and low-water mark) which under an ancient colony ordinance, belong to the riparian proprietors. *Valentine vs. Piper*, 22 Pick. 85; *Piper vs. Richardson*, 9 Metc. 158; *Drake vs. Curtis* (reported in a foot note to *Curtis vs. French*) 9 Cush. 44; *Adams vs. Boston Wharf Co.*, 10 Gray 521; *Attorney General*

Boston Wharf Co., 12 Gray 553; *Gerrish vs. Gary*, 120 Mass, 133. See also cases cited in *Gould on Waters*, Sections 162 and 164. It needs no argument to demonstrate that this rule is as applicable to the division of lands formed by accretions, as it is to the division of "flats," as in the Massachusetts cases, or the division of the shore front for wharfage purposes, as in the New Jersey case.

It is now necessary to consider some additional facts, in light of these general rules. As before noted, all of the lands of the plaintiff and the defendant, as well as all land in that vicinity, was originally fast land. In the years intervening between 1852 and 1870, the ocean had encroached to such an extent that all of the lands of the plaintiff and defendant, and considerably more to the north and west and all to the east were under water. The high-water mark at the last mentioned year was, on a curving line, at approximately the intersection of Pacific & Vermont Avenues. Thereafter, the land which had been washed away began to reform. In 1852 all of the property in the vicinity of the locus in quo and for a considerable distance to the west was surveyed and a map made thereof.

339 Between 1852 and 1854 a street system was laid out on this map and an agreement entered into between the various property owners adopting that street system and dedicating the streets shown thereon to the public. On this map, New Hampshire Avenue is shown as extending in a straight line and at right angles to Pacific Avenue to the low-water mark of the Atlantic Ocean, further in distance than it actually extends at the present time. As before stated, John McClees in 1856 had acquired title to a considerable part of the property in the vicinity of the locus in quo, including all of the property owned by the respective parties to this suit. In 1858 he conveyed a plot 160' x 100', lying approximately midway between Pacific & Oriental Avenues, to one Wooton. In this deed, the property was described as lying on the south side of New Hampshire Avenue, 150' from the corner of Pacific Avenue, and the various courses were run in accordance with these two avenues. In 1897 McClees conveyed to the Atlantic City Beach Front Improvement Company a part of the land which he had acquired from Leeds, excepting the lot which he had theretofore conveyed to Wooton, by a deed wherein the first course was stated to begin on the southerly side of Pacific Avenue, 175' east of Vermont Avenue and extending in an easterly direction along Pacific Avenue to the land of the Camden & Atlantic Land Company, thence to the edge of Absecon Inlet, thence along the high-water mark thereof and of the Atlantic Ocean to a point 175' east of Vermont Avenue, and thence north parallel with Vermont Avenue, a certain number of feet to the *placing* beginning. The Atlantic City Beach Front Improvement Company in turn conveyed a parcel of the then up-
land to a predecessor in title of the defendant by reference to
340 New Hampshire, Oriental, Atlantic and Pacific Avenues, and made New Hampshire Avenue the easterly boundary of the property. That grantee as well as defendant's immediate predecessors in title conveyed by like reference to the street system, and by

the same easterly boundary. The Atlantic City Beach Front Improvement Company also conveyed to plaintiff's predecessors in title by reference to the same street system and made New Hampshire Avenue the westerly boundary of the property so conveyed, as did likewise each of the plaintiff's subsequent predecessors in title. New Hampshire Avenue is an improved street. Manifestly, there is here a clear recognition by the common grantor of the parties to this suit, as well as by McClees, of New Hampshire Avenue, as laid down on the original map, as a boundary line between at least two portions of the upland. And in this connection it must be borne in mind that the land conveyed by the Atlantic City Beach Front Improvement Company to the predecessors in title of the plaintiff and defendant, respectively, was alluvial land, some of which had been formed by accretions before the Company acquired title from McClees and some of it afterwards. It seems to me that the case thus falls clearly within the principle of the rule last above mentioned. There are differences, I freely admit, between the facts of the cases heretofore cited to support the rule, and the facts of the case at bar, but none which distinguish them in principle. Not only do I think that the owners of all of this land, as it existed in 1854, in dedicating New Hampshire Avenue as a public street, across the same, to and at right angles to the ocean, divided the land into two parts and thus fixed the natural side lines of accretion gains
341 for those parts, as suggested in Judge White's opinion in the Dewey Land Company case, but the subsequent owners down to and including the plaintiff and defendant, have, by the recognition of New Hampshire Avenue as a boundary line, so divided the upland which in fact had been formed by accretions, as to make it inequitable to adopt any other division lines for accretion gains. Indeed, to do otherwise would be to fail to give effect to what may be clearly presumed, from the conduct and conveyances, of their predecessors in title, was their understanding and intention. In addition, since 1900, there have been recorded some 400 deeds and 200 or 300 mortgages affecting the property in the vicinity of the locus in quo. In all of these, the properties have been described by lines running at right angles to and parallel with the street system—both as respects that which was upland at the time the defendant received his riparian grant, as well as that which has since been formed by accretions. Moreover, the newly formed land in the vicinity of the locus in quo has, to a very great extent, been built upon and large sums of money invested therein. The plaintiff has been assessed and has paid taxes, as well as assessments for improvements on the locus in quo. It is manifest, therefore, that if it should be held that the respective riparian proprietors are entitled to accretions in accordance or approximately in accordance with the lines of their riparian grants (there were riparian grants made at about the same time as the defendant's, both to the west of his land and to the east of the plaintiff's land) a very great confusion in titles would result and the door be thrown open, in the straightening out of the lines, to the making of exorbitant demands.

on the part of those who would thus be held to own parts of lands which has been improved on the assumption that the various riparian proprietors were entitled to accretions on parallel and at right angles respectively to the street system. On the other hand, if it be held that accretions should be awarded in accordance with such street systems, these difficulties will all be avoided and a stability given to titles in that vicinity. I appreciate, of course, that such a holding will result in certain persons holding riparian grants for land under water when they do not own the upland immediately in front thereof. What effect that may have upon the validity of such riparian grants under the New Jersey statutes it is not necessary to determine in this case. Under the rule heretofore adopted, as new land forms hereafter, it is clear the inland boundary of the riparian grant will move oceanward and thus no practical difficulty will be experienced, at least until some attempt has been made by holders of riparian grants to reclaim the land and under water, in ascertaining who is the owner of the land formed by accretions from time to time. It seems entirely clear, therefore, that the land formed by accretions since the riparian grant, or preferably since the Atlantic City Beach Front Improvement Company made its first conveyance to one of defendant's predecessors in title, should be divided in accordance with the street system. If such a course is adopted, and the plaintiff decreed to be entitled to the accretions formed between the easterly line of New Hampshire Avenue and a line beginning the same number of feet east of New Hampshire Avenue as the easterly boundary line of his original upland (as it was when Atlantic City Beach Front Improvement Company conveyed it) is distant therefrom, and running parallel to New Hampshire Avenue, and if the defendant is decreed to be entitled to the accretions formed between like lines on the westerly side of New Hampshire Avenue, it is apparent that each will get approximately an equal share of the newly formed land in proportion to their upland, so far as frontage on the ocean is concerned; each will secure access to the water, and each will have approximately an equal share of the new high-water line of the ocean in proportion to his share of the original line. Such a division will, therefore, be fair and equitable under all of the circumstances, and thus, in addition, will comply with the before mentioned fundamental rules. Whether the riparian proprietors who own lands east of the plaintiff's lands should have the accretions divided among them on lines parallel with New Hampshire Avenue or on lines parallel with Pacific & Oriental Avenues, it is not necessary to decide. I merely make this observation because of one of the points made in the brief of counsel for the defendant. It is true that Judge White, in the opinion which he delivered in the Dewey Land Company case, seems to have expressed an inclination to accept for the division of accretion gains the lines adopted by the Riparian Commissioners in making riparian grants, provided that in any given case, it was not shown that such a division would be unfair. But he also indicated, as before stated, that a different conclusion might be reached if it should be found that

by the dedicating of New Hampshire Avenue, etc., it was inequitable for the State, in making its grant, to have disregarded the lines so fixed. Whether or not the act of the State in disregarding the lines of the streets was inequitable, it is clear for the reasons heretofore given, that it would be inequitable or at variance with the presumed intention or understanding of the predecessors in title of the

344 respective parties to divide the accretions in accordance with the lines of the riparian grant. Upon the whole, therefore,

I will hold that the plaintiff is entitled to all lands formed by accretions between the easterly line of New Hampshire Avenue and a line drawn parallel thereto and distant easterly therefrom the same number of feet as the easterly boundary line of his original upland (as it was when the Atlantic City Beach Front Improvement Company conveyed it) is distant from the easterly line of New Hampshire Avenue. This necessarily results in finding that the defendant has no title by reason of accretions to any part of the locus in quo. As I have heretofore found that he has no title thereto by reason of the State's riparian grant, and as his only claim of title is based on the riparian grant and his right to accretions, it follows that he has no right, title or interest in the locus in quo. This conclusion renders it unnecessary for me to consider whether the doctrine pertaining to lands lost by avulsion and subsequently regained, is applicable to this case, or whether the principle of *Banks vs. Ogden*, 2 Wall. 657, is pertinent. The plaintiff is entitled to a decree to the above effect, with costs.

UNITED STATES OF AMERICA,

District of New Jersey, ss:

I, George T. Cranmer, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original Opinion on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my
345 name and affixed the seal of the said Court, at Trenton, in said District, this Twenty-sixth day of December nineteen hundred and nineteen.

[Seal of District Court of the United States, District of New Jersey.]

GEORGE T. CRANMER,

Clerk District Court U. S.

By R. S. CHEVRIER,

Deputy.

EXHIBIT E.

United States District Court for the District of New Jersey.

In Equity.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and Real Estate Title Insurance and Trust Company of Philadelphia, Executors and Trustees under the Will of Samuel F. Nirdlinger, Deceased, Plaintiffs,

vs.

HENRY E. STEVENS, JR., Defendant.

Final Decree.

This cause coming on to be heard in the presence of Bourgeois & Coulomb, Esqs., and Robert H. McCarter, Esq., of Counsel with plaintiffs, and Wilson & Carr, Esqs., of Counsel with the defendant, and the bill of complaint with the amendments thereto, the
346 answer with the amendments thereto, the counter-claim and answer to counter-claim, proofs and exhibits having been read, heard and considered, and the arguments of the respective counsel having been heard, and the Court having considered the same, and it appearing that since the argument of said cause, to wit, on or about the 13th day of November, 1918, Samuel F. Nirdlinger, the plaintiff, departed this life, leaving a last will and testament by which all his title to and interest in lands and premises of which he died seized, including the lands and premises in question in this suit, passed to and became vested in Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, the executors and trustees named and designated in the last will and testament of the said Samuel F. Nirdlinger, and that by order of this court duly made on the — day of —, the death of the said Samuel F. Nirdlinger was suggested and it was directed that the said Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, Executors and Trustees under the will of Samuel F. Nirdlinger, deceased, be substituted as plaintiffs herein; and it further appearing that there is a valid controversy in this suit between citizens of different states, and that the matters in controversy are of a value, exclusive of costs, of an amount in excess of \$3,000; and it appearing that defendant by his answer admitted title in plaintiffs to so much of the lands described in plaintiff's bill of complaint as lie
347 Northerly and Easterly of the fourth course described in the deed of the Riparian Commissioners of the State of New Jersey to William H. Bartlett and Elwood S. Bartlett, bearing date the 28th day of June, 1900, recorded in the Office of the Clerk of Atlantic County at May's Landing, New Jersey, in Book No. 248 of Deeds, page 475 &c., hereinafter particularly referred to, but claimed to own so much of the lands described in plaintiffs' bill of complain

as lie Southerly and Westerly of said fourth course in said decree from the Riparian Commissioners of the State of New Jersey to said Bartlett and others, and that defendant by his answer further admitted peaceable possession of the lands in dispute in the plaintiff's bill, and it appearing to the satisfaction of the Court that the suit was referred to the Court of Chancery of New Jersey referred to in the answer and amended answer of said Henry E. Stevens, wherein Dewey Land Company, a corporation of the State of New Jersey, and Samuel F. Nirdlinger were complainants, and Henry E. Stevens and James W. Northup were defendants, in which a final decree was entered in said Court of Chancery on the 7th day of September, 1912, dismissing said bill of complaint, from which final decree an appeal was duly taken by the said complainants to the Court of Errors and Appeals of the State of New Jersey, in which Court the said decree of the Court of Chancery was affirmed by the final decree of the Court of Errors and Appeals entered on the 15th day of June, 1914, it is not res adjudicata of the plaintiffs' claim in this suit and constitutes no bar to the prosecution of this suit; and it further appearing that the defendant's said claims to the lands and premises in litigation herein and hereinafter particularly described are not valid claims, and that the said defendant has no estate or interest in said lands either by virtue of a riparian grant from the State of New Jersey by Foster M. Vorhees, Governor, Willard C. Fisk, William K. Kloeke, John I. Holt, and John J. Farrell, Riparian Commissioners, to William H. Bartlett and Elwood S. Bartlett, bearing date the 28th day of June, 1900, and recorded in the Office of the Riparian Commissioners of the State of New Jersey, in Liber N, folio 245 &c., and also in the Office of the Clerk of Atlantic County, New Jersey, in Book No. 248 of Deeds, page 475 &c., that said William H. Bartlett and Elwood S. Bartlett being predecessors in title of the defendant, Henry E. Stevens, or by virtue of accretions, as was claimed by the defendant and set up in this cause, and no further claim being set up by the said answers, pleading, or otherwise, and none other appearing, and the plaintiffs appearing to be entitled to the relief prayed for in the said bill of complaint.

It is thereupon, on this 24th day of May, A. D. 1920, by the United States District Court for the District of New Jersey, ordered, adjudged and decreed, and the said Court, by virtue of its power and authority, doth hereby order, adjudge and decree that the said suit in the Court of Chancery hereinabove specifically referred to wherein Dewey Land Company and Samuel F. Nirdlinger were complainants, and Henry E. Stevens and James W. Northup were defendants, which was appealed to the Court of Errors and Appeals of the State of New Jersey, and the matters and things therein decided are not res adjudicata of the issues herein contained, and constitute no bar to the plaintiffs prosecuting this suit.

It is further ordered, adjudged and decreed that said defendant has no right, title or interest in or encumbrance upon the said lands and premises in dispute in this action, namely, all that certain tract or parcel of land and premises situate, lying and being in the City

of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

349 Beginning at the intersection of the fourth course or description contained in the riparian grant from the State of New Jersey, by Foster M. Vorhees, Governor, Willard C. Fisk, William Kloeke, John I. Holt and John J. Farrell, Riparian Commissioners, to William H. Bartlett, and Elwood S. Bartlett, bearing date the 28th day of June, 1900, recorded in the Office of the Riparian Commissioners of the State of New Jersey in Liber N, Folio 245, &c., also in the Office of the Clerk of Atlantic County, New Jersey, in Book No. 248 of Deeds, page 475, &c., with the Easterly line of New Hampshire Avenue; thence Southeasterly in and along said fourth course of said deed to the high water mark of the Atlantic Ocean; thence Southwesterly, in and along the high water mark of the Atlantic Ocean to the Easterly line of New Hampshire Avenue; thence Northerly, in and along the Easterly line of New Hampshire Avenue, to the place of beginning.

And that the lands and premises described in complainant's bill of complaint, to wit, all that certain tract or parcel of land and premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

Beginning at the intersection of the Southerly line of Dewey Place with the Easterly line of New Hampshire Avenue, thence extending Eastwardly, in and along the Southerly line of Dewey Place, 190 feet; thence Southwardly, parallel with New Hampshire Avenue, 442 feet more or less to the high water mark of the Atlantic Ocean; thence Southwesterly, along the high water mark of the Atlantic Ocean to the Easterly line of New Hampshire Avenue; thence Northwardly, in and along the Easterly line of New Hampshire Avenue, 577 feet more or less to the place of beginning; are the lands
350 and premises of Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, Executors and Trustees under the will of Samuel F. Nirdlinger, deceased, and the said defendant, Henry E. Stevens, Jr., has no estate, interest in or encumbrance upon the same or any part thereof, and that in respect to all of said lands and premises hereinabove last described, so far as relates to any claim thereon by or on behalf of the above named defendant, the title of the plaintiffs in and to the same and every part thereof is hereby determined, fixed and settled, and declared to be good.

It is further ordered, adjudged and decreed that the cloud cast upon plaintiffs' lands by the riparian grant made by the State of New Jersey and hereinabove particularly referred to, so far as the same overlaps the lands hereinabove last described, is decreed to be null and of no effect, and that the lands and premises hereinabove last described are hereby decreed to be relieved of and clear from the lien or cloud occasioned by said riparian grant and by the said deed from the State's grantees to William H. Bartlett and Elwood S. Bartlett, defendant's predecessors in title.

It is further ordered, adjudged and decreed that defendant do pay to the plaintiffs their costs of suit to be taxed, and that they have execution therefor according to the rules and practice of this court.

THOMAS G. HAIGHT,
Judge.

Approved as to form.
CARR & CARROLL,
Attys. of Deft.

351

Assignment of Errors.

United States District Court for the District of New Jersey.

In Equity.

SAMUEL F. NIRDLINGER, Plaintiff,

vs.

HENRY E. STEVENS, JR., Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the twenty-fourth day of May, nineteen hundred and twenty.

I.

That the United States District Court for the District of New Jersey erred in adjudging that the suit in the New Jersey Court of Chancery, wherein Dewey Land Company and Samuel F. Nirdlinger were complainants, and Henry E. Stevens, Jr., and James W. Northup were defendants, and which was appealed to the Court of Errors and Appeals of the State of New Jersey, and the matters and

352 things therein decided were not res adjudicata of the issues herein contained, and that the said suit constituted no bar to the plaintiff in prosecuting this suit; whereas this Court should have decreed that the said suit in the New Jersey Court of Chancery and the decree entered therein were res adjudicata of the issues herein contained, and did constitute a bar to the plaintiff in the prosecution of this suit.

II.

That the United States District Court for the District of New Jersey erred in adjudging that the defendant Henry E. Stevens, Jr. had no right, title or interest in or encumbrance upon the lands and premises in dispute in this action; whereas the Court should have adjudged that the said defendant was lawfully seized in fee simple of all of the lands and premises described in paragraph 4e of the answer.

and lying eastwardly of the easterly line of New Hampshire Avenue, and more particularly described as follows:

Beginning at the intersection of the easterly line of New Hampshire Avenue with the fourth course in the description of tract No. 2 described in paragraph 4c of the answer of this defendant; thence extending southwardly along the easterly line of New Hampshire Avenue extended to a point in the exterior line established by the riparian commissioners where it is intersected by the easterly line of New Hampshire Avenue extended southwardly; thence eastwardly along said exterior line curving to the left on a radius of 4,000 feet to where the said exterior line intersects the fourth course of said description; thence northwestwardly in a straight line to a point intersecting the easterly line of New Hampshire Avenue, being the place of beginning.

353 And that the title of the defendant to the said lands is paramount to and exclusive of any title of the plaintiff therein or thereto, and should upon such adjudication have directed the plaintiff to execute a proper instrument in writing, duly acknowledged, retracting any claim to the lands owned by defendant, and particularly described in paragraph 4e of the answer, and that the plaintiff, his servants and agents, be perpetually enjoined from making any claim thereto arising out of any matter or thing set forth in the bill of complaint, and from making or attempting to make any conveyance, lease, assignment or transfer of any interest in said lands particularly described in paragraph 4e of said answer where said conveyance, lease, assignment or transfer is based upon any alleged right or claim of the plaintiff existing at the time of the filing of the bill.

III.

That the United States District Court for the District of New Jersey erred in adjudging that "the cloud cast upon plaintiff's lands by the riparian grant made by the State of New Jersey (particularly referred to in said decree), so far as the same overlaps the lands last described in said decree, is decreed to be null and void and of no effect, and that the lands and premises in said decree last above described are hereby decreed to be relieved of and clear from the lien or cloud occasioned by the said riparian grant and by the said deed from the State's grantees to William H. Bartlett and Elwood S. Bartlett, defendant's predecessors in title"; whereas the Court should have decreed that defendant's title under said riparian deed was a valid and subsisting fee simple title paramount to and exclusive of all title, claim, interest or demand of said plaintiff.

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IV.

That the United States District Court for the District of New Jersey erred in that it ordered, adjudged and decreed that the defendant pay to the plaintiff his costs of suit to be taxed, and that he have execution therefor according to the rules and practice of this Court;

whereas no costs should have been taxed against this defendant, but on the contrary should have been taxed against the plaintiff.

Wherefore, the appellant prays that said decree be reversed and that the District Court of the United States for the District of New Jersey be ordered to enter a decree accordingly.

Attorneys for Appellant.

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Docket Entries.

United States District Court, District of New Jersey.

In Equity.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and REAL ESTATE TITLE
INSURANCE AND TRUST COMPANY OF PHILADELPHIA

VS.

HENRY E. STEVENS, JR.

Oct. 26, 1914. Bill filed.
 " 27, " Subpœna issued.
 Nov. 2, " Subpœna returned defendant not found in District
 and filed.
 " 23, " Affidavit of Harry R. Coulomb filed.
 " " " Order for Publication filed.
 Feb. 13, 1915. Appearance of Wilson & Carr, Solicitors for defend-
 ant, filed.
 " 15, " Notice of motion for further and better statement of
 claim, &c., filed.
 Mar. " " Hearing on motion for further and better statement
 of claim, &c., Motion granted.

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May 15, " Answer filed.
 " 25, " Order amending bill of complaint, filed.
 July 12, " Notice of Motion to separately hear paragraph 5 of
 Answer before trial, filed.
 " " " Order to separately hear paragraph of Answer, &c.,
 filed.
 Sept. 7, " Hearing on part of Answer. Motion for Decree for
 Defendant. Motion denied.
 " 14, " Cause placed on Calendar.
 Oct. 6, " Amendment to Answer, filed.
 " 7, " Order amending Bill of complaint, filed.
 " " " Complainants' answer to counter-claim filed.
 Nov. 3, " Cause placed on Calendar.
 Mar. 1, 1916. Notice of trial, filed.
 Sept. 5, " Cause placed on Calendar.
 Nov. 8, " " " " "
 " 21, " Notice of Motion to dismiss Bill, filed.
 Dec. 11, " Hearing on motion to dismiss bill. Decision reserved.

Jan. 16, 1917. Cause placed on Calendar.
 " " " Continued for Term.
 Apr. 3, " Cause placed on Calendar.
 June 7, " Memorandum, filed.
 Aug. 20, " Notice of trial, filed.
 Oct. 9, " Order amending bill and Answer to counter-claim
 filed.
 " " " Trial before the Court.
 " 10, " " " " "
 " 11, " " " " "
 " 9, " Order amending answer, filed.

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Nov. 1, " Trial before the Court. Decision reserved.
 Dec. 26, 1919. Opinion filed.
 " " " Testimony before Court filed.
 May 24, 1920. Petition to substitute parties complainant filed.
 " " " Order for substitution of parties complainants filed.
 " " " Order amending Bill filed.
 " 25, " Final Decree for complainants with costs, filed.
 Nov. 19, " Assignment of Errors, filed.
 " " " Petition for Appeal and Allowance, filed.
 " 27, " Bond on Appeal, filed.
 " " " Citation issued.
 Dec. 7, " Citation returned, service acknowledged. Copy filed.

361 & 362 United States Circuit Court of Appeals for the Third
 Circuit.

No. 2642.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and REAL ESTATE TITLE
 Insurance and Trust Company of Philadelphia, Executors and
 Trustees under the Will of Samuel F. Nirdlinger, Deceased, Re-
 spondents,

vs.

HENRY E. STEVENS, JR., Appellant.

On Appeal from United States District Court for the District of New
 Jersey.

EXHIBITS.

Carr & Carroll, Attorneys for Appellant.

363 EXHIBITS.

United States Circuit Court of Appeals for the Third Circuit.

No. 2642.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and REAL ESTATE TITLE Insurance and Trust Company of Philadelphia, Executors and Trustees under the Will of Samuel F. Nirdlinger, Deceased, Respondents,

VS.

HENRY E. STEVENS, JR., Appellant.

On Appeal from United States District Court for the District of New Jersey.

EXHIBITS.

By agreement between counsel for the appellant and respondents the following exhibits are not to be printed or produced, the same in the judgment of counsel, not being necessary to a decision of the controversy:

Respondents' Exhibits to be Omitted.

Exhibit P1.....	Page 125
“ P2.....	“ 202
“ P3.....	“ 218
“ P4.....	“ 234
“ P5.....	“ 265
“ P6.....	“ 265

(This is the same as Exhibit C8 in the printed record of 364 Dewey Land Co. vs. Stevens, at page 67, which record is Exhibit D1 in this case.)

Exhibit P7.....	Page 266
“ P8.....	“ 266

(See record Dewey Land Co. vs. Stevens, page 73, Exhibit D4.)

Exhibit P13.....	Page 267
“ P14.....	“ 268

Exhibits P30, P31, P32, P33, P34 and P35 sufficiently appear in the Appeal Record, and it is agreed that it is not necessary to print the same in full. These exhibits are paged as follows:

Exhibit P30.....	Page 276
“ P31.....	“ 276
“ P32.....	“ 277
“ P33.....	“ 277
“ P34.....	“ 277
“ P35.....	“ 277

Appellant's Exhibits to be Omitted.

Exhibit D1.....Page 87

(This is the printed record in the case of Dewey Land Co. vs. Stevens, consisting of 115 pages. But one copy of this record is available. If the Court desires additional copies, appellant's counsel, upon being so advised, will have same re-printed, in which case it will be necessary to return to appellant's counsel original Exhibit D1 in order that the same might be sent to the printer.)

Exhibit D5	Page 89
" D10.....	" 99
" D11.....	" 99
" D12.....	" 159
" D13.....	" 169

NOTE.—Exhibit D6 (printed with the exhibits) has annexed to it and forming a part thereof, a map of the riparian grant. As this grant is shown as a part of map, Exhibit D8, the map annexed to D6 has been omitted. On Exhibit D8 the grant is identified as a riparian grant from the State of New Jersey to Bartlett.

Exhibit D8.....Page 92

(Three blue prints have been made for the information of the Court.)

Exhibit D9.....Page 93

(Rowand map of Absecon Beach. Only one copy is available.)

NOTE.—Exhibit D1, is not bound with the printed exhibits, but is included in the package of exhibits forwarded to the clerk.

Exhibit D-9 is bound in with printed exhibits marked with red ink "No. 1."

Exhibit D-8 is bound in with printed exhibits marked with red ink "No. 2," also in copy marked "No. 1."

366 EXHIBIT P9.

Deed.

John McClees
to
Jonah Wooton.

Dated Mar. 19, 1858.
Rec. April 17, 1858.
Book K page 507.
Consideration \$300.00.
Premises situate Atlantic City.

Beg. at a point in the S. side of N. H. Ave. 150 ft. from intersection of Pac. and N. H. Aves., thence

- (1) Along South side of N. H. Ave. S. E. 100 ft.,
- (2) On a line at Right angles to N. H. Ave. S. W. 160 ft.,
- (3) N. W. and par. to S. line of N. H. Ave. 100 ft.,
- (4) N. E. on a line parallel to E. line of Pac. Ave. 160 ft. to the beg.

EXHIBIT P10.

Deed.

John McClees

to

Jacob R. Eby.

Dated Jan. 10, 1860.

Rec. Mar. 29, 1860.

Book M. page 708.

Tract #1—Beg. at a point in the S. line of Pac. Ave. 40 ft. E. from the S. E. cor. of Pac. and Vt. Ave., thence

- (1) Along said Pac. Ave. E. 135 ft. to the edge of Pac Ave.
- (2) S. and par. with Vt. Ave. a distance of 337 ft. in line of land belonging to Jacob R. Eby.
- (3) N. W. along the said line 364 ft. to the beg.

367

EXHIBIT P11.

Deed.

Camden and Atlantic Land Co.

to

John McVey.

Dated Feb. 26, 1858.

Rec. Mar. 29, 1860.

Book M. page 710.

Premises Atlantic City.

Beginning at a point in the S. line of Pac. Ave. between the lands of Manassa McClees and the said Land Co., 40 ft. E. from the E. line of R. I. Ave., thence

- (1) Along the S. side of Pac. Ave. N. 67 deg. E. for a distance of 400 ft. to a point in the land of boundary between the lands of John McClees and the said Land Co., 40 ft. E. of the E. line of Vermont Ave.,

- (2) Along the said line of boundary of land of John McClees and Land Co., S. 44¼ deg. E. 650 ft. m. or l. to the Surf line,

(3) Along the said Surf line 400 ft. More or less on a West course to its intersection with the line of boundary of said land of Manassa McClees and Land Co.,

(4) Along said line of boundary of Manassa McClees and Land Co. N. $44\frac{1}{4}$ deg. W. 650 ft. m. or l. to a point in the S. side of Pac. Ave. and the place of the beg.

368

EXHIBIT P12.

Deed.

John McVey and Harriet, His Wife; Jacob R. Eby and Elizabeth G.,
His Wife,

to

John McClees.

Dated Jan. 10, 1860.

Rec. Apr. 10, 1872.

Book 42, page 189.

Premises situate Atlantic City.

Lot #2—Beg. at a point in the dividing line between McClees and McVey 67 ft. N. W. of Oriental Avenue; thence

(1) S. and parallel with Vermont Ave. crossing Oriental Ave. 175 ft. E. of the Vermont Ave. to low water line;

(2) E. along low water line to a point in the aforesaid dividing line;

(3) N. W. along dividing line and crossing Oriental Ave. to beg.

369

EXHIBIT P15.

Deed.

No. 7.

John McClees

to

The Atlantic City Beach Front Improvement Co.

Dated March 9th, 1897.

Recd. March 15th, 1897.

Book 211, page 174.

Consideration \$20,000.

Grant and habendum to successors and assigns.

Acknowledged March 9th, 1897, in Atlantic County, before Clifton C. Shinn, Master in Chancery, by the party of the first part.

Conveys the following,—

Beginning on the Southerly side of Pacific Avenue, 175 feet East of Vermont Avenue, and extending thence East 746 feet, more or less, to line of Camden and Atlantic Land Company; thence South $44\frac{1}{2}$ degrees East by same 336 feet, more or less, to edge of Absecon Inlet; thence South by high water mark of Absecon Inlet and the Atlantic Ocean 1,024 feet, more or less, to point 175 feet East of Vermont Avenue, thence North parallel with Vermont Avenue 650 feet, more or less, to the place of beginning.

Excepts the following lot:

Beginning on the West side of New Hampshire Avenue 150 feet South of Pacific Avenue, and extending thence West parallel with Pacific Avenue 160 feet; thence South parallel with New Hampshire Avenue 100 feet; thence East parallel with Pacific Avenue 160 feet to New Hampshire Avenue; thence North by same 100 feet to beginning.

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EXHIBIT P16.

Deed.

No. 21.

The Atlantic City Beach Front Improvement Co.

to

Charles G. Henderson, Jr., J. Franklin Moss, John C. Hancock.

Dated November 1st, 1899.

Recd. November 6th, 1899.

Book 237, page 208.

Consideration \$20,000.

Grant and habendum to Heirs and assigns.

Covenant of special warranty.

Proven November 1st, 1899, in Atlantic County before Burrows C. Godfrey, Master in Chancery, by Clifton C. Shinn, Secretary of The Atlantic City Beach Front Improvement Co.

Conveys the following,—

Beginning in the South line of Pacific Avenue, 280 feet East of New Hampshire Avenue, and extending thence East by Pacific Avenue (crossing Main Avenue) to line of land now or late of the Camden and Atlantic Land Company; thence South $44\frac{1}{2}$ degrees East by said line 336 feet, more or less, to Absecon Inlet or Atlantic Ocean; thence South by high water mark of said Inlet and Ocean to point 90 feet East of New Hampshire Avenue, if extended; thence North parallel with New Hampshire Avenue (crossing Oriental Avenue 60 feet wide and Dewey Place 50 feet wide) to a point 100 feet South of Pacific Avenue; thence East parallel with Pacific Avenue 190 feet; thence North parallel with New Hampshire Avenue 100 feet to beginning.

371

EXHIBIT P17.

Deed.

No. 22.

The Atlantic City Beach Front Improvement Co.

to

The States Avenue Land Co.

Dated May 24th, 1900.

Reed. May 28th, 1900.

Book 244, page 418.

Consideration \$23,500.

Grant and habendum to its successors and assigns.

Proved May 24th, 1900, in Atlantic County, before Robert H. Ingersoll, Master in Chancery, by Clifton C. Shinn, Secretary of The Atlantic City Beach Front Improvement Co.

Conveys the following,—

Beginning in the East line of New Hampshire Avenue, 240 feet South from Pacific Avenue and at the Southeast corner of Dewey Place (50 feet wide), and extending thence South along New Hampshire Avenue 160 feet, more or less, to high water mark of Atlantic Ocean; thence East by same to point 90 feet East of New Hampshire Avenue; thence North parallel with New Hampshire Avenue, 160 feet, more or less, to the South line of said Place; thence West by same 90 feet to beginning.

372

EXHIBIT P18.

Deed.

No. 30.

Charles G. Henderson, Jr., Mary A., His Wife; J. Franklin Moss, Carrie H., His Wife; John C. Hancock, Carrie D., His Wife,

to

Roland Conrow.

Dated April 14th, 1903.

Reed. April 17th, 1903.

Book 287, page 76, &c.

Consideration \$1.

Grant and Habendum to heirs and assigns.

Acknowledged April 14th, 1903, in Atlantic County before Samuel C. Kulp, Attorney at Law, by parties of the first part.

Conveys the following,—

Beginning in the South line of Pacific Avenue, 280 feet East of New Hampshire Avenue, and extending thence East along Pacific Avenue 120 feet to the West line of Maine Avenue; thence South along same 460 feet, more or less, to high water line of Ocean; thence in line of Maine Avenue extended to high water line of the Ocean as in 1856; thence South along same to point 90 feet East of New Hampshire Avenue, extended; thence North parallel with same and 90 feet therefrom to the South line of said Place; thence East along same 190 feet; thence North parallel with Maine Avenue crossing said Place 240 feet to beginning.

Together with right, title and interest of the parties of the first part of, in and to lands under water lying to the West and South of the centre lines of Maine Avenue extended.

Subject, nevertheless, to following conditions and restrictions to wit: That no building shall ever be erected on any of the 373 lots fronting on the Southerly side of Dewey Place within the distance of 290 feet from New Hampshire Avenue and running in depth 80 feet within 10 feet of the front property line of Dewey Place, nor nearer the side property lines than 3 feet, provided that any person owning two or more contiguous lots may build upon any part thereof so long as they remain one entire tract; provided that such building be not within 3 feet of the side lines of such entire tract.

EXHIBIT P19.

Deed.

No. 13.

Roland Conrow, Maud M., His Wife,

to

The States Avenue Land Co.

Dated April 14th, 1903.

Recd. April 17th, 1903.

Book 286, page 113.

Consideration \$1.

Grant and habendum to Successors and assigns.

Acknowledged April 15, 1903, in Atlantic County, before John O. Wilson, Master in Chancery, by the parties of the first part. Conveys the following,—

Beginning in the South line of Dewey Place, 90 feet East of New Hampshire Avenue, and extending thence East along Dewey Place 100 feet by South 350 feet, more or less, to present high water mark in the Atlantic Ocean, and still oceanward to high water mark as existed in 1856.

374 Together with all interests of the parties of the first part of, in and to lands under waters of the Atlantic Ocean lying

between the boundaries of the land above described and oceanward thereof.

Subject to restrictions in deed recorded in Book 287, page 76, (item No. 30).

EXHIBIT P20.

Deed.

No. 37.

The States Avenue Land Co.

to

The Dewey Land Co.

Dated December 19th, 1904.

Recd. January 11th, 1905.

Book 313, page 363.

Consideration \$1.

Grant and habendum to successors and assigns.

Proved December 31st, 1904, in Atlantic County, before H. W. Lewis, Master in Chancery, by Robert H. Ingersoll, Secretary of the party of the first part.

Conveys the following,—

Beginning in the East line of New Hampshire Avenue, 240 feet South from Pacific Avenue, said beginning point being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East, parallel with Pacific Avenue, and along the South line of said place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to high water line of the Atlantic Ocean; thence Southwest along same the several courses and distances thereof to the East line of New Hampshire Avenue; thence North along same 438 feet, more or less, to beginning.

375

EXHIBIT P21.

Deed.

No. 41.

Dewey Land Company

to

Samuel F. Nirdlinger.

Dated December 9th, 1907.

Recd. April 8th, 1908.

Book 382, page 19.

Consideration \$9,000.

Grant and habendum to heirs and assigns.

Proved March 30th, 1908, in Atlantic County, before J. Wharton Stokes, Master in Chancery, by Robert H. Ingersoll, Secretary of Dewey Land Company.

Conveys the following,—Undivided one-fourth interest in:

Beginning in the East line of New Hampshire Avenue 240 feet south from Pacific Avenue, being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East, parallel with Pacific Avenue, along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to high water line of Atlantic Ocean; thence Southwest along same the several courses &c. to the East line of New Hampshire Avenue; thence North by same 438 feet, more or less, to beginning.

Together with all Riparian Rights had or to be purchased by the party of the first part in connection with said property.

Subject to rights of Atlantic City in said premises for Boardwalk or Park purposes.

376

EXHIBIT P22.

Deed.

No. 42.

Dewey Land Company

to

Samuel F. Nirdlinger

Dated January 20th, 1909.

Recd. January 22nd, 1909.

Bk. 395, page 271.

Consideration \$3,333.

Grant and habendum to his heirs and assigns.

Acknowledged January 20th, 1909, in Camden County, before Clement R. Lippincott, Commissioner of Deeds, by Robert H. Ingersoll, Secretary of Dewey Land Company.

Conveys the following: Undivided one-twelfth interest in:

Beginning in the East line of New Hampshire Avenue, 240 feet South from the South line of Pacific Avenue, said point being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East parallel with Pacific Avenue and along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to the high water line of the Atlantic Ocean; thence Southwest along said high water line of the Atlantic Ocean the several courses and distances thereof to the Easterly line of New Hampshire Avenue; thence North along the East line of New Hampshire Avenue 438 feet, more or less, to beginning.

Together with all riparian rights had or to be purchased by the said party of the first part in connection with said property.

377 Subject to the rights of the City of Atlantic City in said above described premises for Boardwalk or Park purposes.

The said party of the first part having previously conveyed to the said Samuel F. Nirdlinger an equal undivided one-fourth part in said above described lands and premises (Book 382, page 19), and this deed conveys unto the said party of the second part an equal undivided one-twelfth part in the said above described lands, the said party of the second part holds and has vested in him upon the execution hereof an equal undivided one-third part or interest in said lands and premises herein described.

EXHIBIT P23.

Deed.

No. 43.

Dewey Land Company

to

Samuel F. Nirdlinger, Professionally Known as Samuel F. Nixon.

Dated February 10th, 1909.

Recd. February 16th, 1909.

Book 398, page 116.

Consideration \$6,666.66.

Grant and habendum to his heirs and assigns.

Proved February 10th, 1909, in Atlantic County, before George A. Elvins, Comr. of Deeds of New Jersey, by Robert H. Ingersoll, Secretary of Dewey Land Company.

Conveys one-sixth part in following,—

Beginning in the East line of New Hampshire Avenue, 240 feet

378 South from the South line of Pacific Avenue, said point being the Southeast corner of New Hampshire Avenue and Dewey Place, and extending thence East, parallel with Pacific Avenue and along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 294 feet, more or less, to high water line of the Atlantic Ocean; thence Southwest along said high water line of the Atlantic Ocean the several courses thereof to the Easterly line of New Hampshire Avenue; thence North along the East line of New Hampshire Avenue 438 feet, more or less, to beginning.

Together with all riparian rights had or to be purchased by the said party of the first part in connection with said property.

Subject to the rights of the City of Atlantic City in said above described premises for Boardwalk or Park purposes.

EXHIBIT P24.

Deed.

No. 57.

Dewey Land Company

to

Louis E. Stern.

Dated July 17th, 1912.

Recd. July 22nd, 1912.

Book 486, page 443 &c.

Consideration \$1.

Grant and habendum to his heirs and assigns.

No covenant.

Proved July 20th, 1912, in Atlantic County, before George A. Bourgeois, Master in Chancery, by R. H. Ingersoll, Secretary of Dewey Land Company.

Remise, release and forever quit-claim the following,—

379 Beginning at the intersection of the South line of Dewey place with the East line of New Hampshire Avenue and extending thence East along the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 350 feet, more or less, to high water line of Atlantic Ocean as it existed on April 14th, 1903; thence East at right angles to high water line of the Atlantic Ocean as it existed in 1856, 770 feet, more or less, to said high water line as it then existed; thence Southwest along the high water line of the Atlantic Ocean as existed in 1856 to point in said high water line where the same would be intersected by the East line of New Hampshire Avenue, extended; thence North in the East line of New Hampshire Avenue, extended 1,120 feet, more or less, to beginning.

EXHIBIT P25.

Deed.

Samuel F. Nirdlinger

to

Louis E. Stern.

Dated July 17, 1912.

Acknowledged July 17, 1912.

Recorded July 22, 1912.

Book No. 486 of Deeds, page 455.

Consideration \$1.00.

Conveys all that certain tract or parcel of land situate in the City of Atlantic City, in the County of Atlantic and State of New Jersey, particularly described as follows:

Beginning at the intersection of the Southerly line of Dewey Place with the Easterly line of New Hampshire Avenue, thence extending (1) Easterly in the Southerly line of Dewey place one hundred and ninety feet to a point; (2) Southerly, parallel with New Hampshire Avenue eleven hundred and twenty feet more or less to the high water line of the Atlantic Ocean as it existed in eighteen hundred and fifty-six; (3) Southwesterly in and along said high water line to the intersection of the Easterly line of New Hampshire Avenue extended; (4) Northerly in the Easterly line of New Hampshire Avenue extended, eleven hundred and twenty feet more or less to the place of beginning.

EXHIBIT P26.

Deed.

No. 59.

Louis E. Stern (Single)

to

Samuel F. Nirdlinger.

Dated July 17th, 1912.

Recd. July 22nd, 1912.

Book 486, page 447.

Consideration \$1.

Grant and habendum to his heirs and assigns.

Covenant of special warranty.

Acknowledged July 20th, 1912, in Atlantic County, before George A. Bourgeois, Master in Chancery of New Jersey, by Louis E. Stern.

Conveys undivided one-half part of the following.—

Beginning at the intersection of the South line of Dewey Place with the East line of New Hampshire Avenue, and extending thence East in the South line of Dewey Place 190 feet; thence South parallel with New Hampshire Avenue 350 feet, more or less, to high water line of the Atlantic Ocean as it existed on April 14th, 1903; thence East at right angles to high water line of the Atlantic Ocean as it existed in 1856, 770 feet, more or less, to high water line as it then existed; thence Southwest along the high water line of the Atlantic Ocean as it existed in 1856 to point in said high water line where the same would be intersected by the East line of New Hampshire Avenue, extended; thence North in the East line of New Hampshire Avenue, extended, 1,120 feet, more or less, to beginning.

EXHIBIT P27.

Deed.

No. 60.

Louis E. Stern (Single)

to

Dewey Land Company.

Dated July 17th, 1912.

Recd. July 22nd, 1912.

Book 486, page 450 &c.

Consideration \$1.

Grant and habendum to its successors and assigns.

Covenant of special warranty.

Acknowledged July 20th, 1912, in Atlantic County, before George A. Bourgeois, Master in Chancery by party of the first part.

Conveys undivided one-half part of the following,—

Beginning at the intersection of the South line of Dewey
382 Place with the East line of New Hampshire Avenue, and
extending thence East in the South line of Dewey Place 190
feet; thence South parallel with New Hampshire Avenue 350 feet,
more or less, to the high water line of the Atlantic Ocean as it ex-
isted on April 14th, 1903; thence East at right angles to the high
water line of the Atlantic Ocean as it existed in 1856, 770 feet, more
or less, to said high water line as it then existed; thence Southwest
along the high water line of the Atlantic Ocean as it existed in
1856 to point in said high water line where same would be inter-
sected by the East line of New Hampshire Avenue extended; thence
North in the East line of New Hampshire Avenue extended 1,120
feet, more or less, to beginning.

EXHIBIT P28.

Deed.

No. 63.

Dewey Land Company

to

Samuel F. Nirdlinger.

Dated February 4th, 1914.

Recd. February 6th, 1914.

Book 523, page 47 &c.

Consideration \$5,000.

Grant and habendum to his heirs, executors, administrators and assigns.

Covenant of General Warranty.

Proved February 4th, 1914, in Camden County, before Clement R. Lippincott, Commissioner of Deeds, by Emerson Richards, Secretary of Dewey Land Company.

Conveys undivided one-half interest part of the same premises as described in deed, item No. 60.

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EXHIBIT P29.

In Chancery of New Jersey.

Between

DEWEY LAND COMPANY et al., Complainants,

and

HENRY E. STEVENS, JR., et al., Defendants.

On Bill, &c.

Petition for Order Amending Final Decree.

To his Honor Edwin Robert Walker, Chancellor of the State of New Jersey:

The petition of the defendants, Henry E. Stevens Jr., and James W. Northup, respectfully shows the following:

1. A final decree was entered in the above entitled cause on the seventh day of September, nineteen hundred and twelve, dismissing the bill of the complainants; and said final decree was appealed to the Court of Errors and Appeals, and was affirmed by the final decree of that court entered on the fifteenth day of June, nineteen hundred and fourteen.

2. The suit of the complainants upon which said final decree was entered, was a suit to quiet title to certain lands, to which the complainants asserted title on the strength of certain quit-claim deeds, and the defendants upon a certain deed from the Riparian Commissioners of the State of New Jersey, both of which claims are fully set forth in the printed state of the case.

3. The final decree was first entered by the Chancellor, after the filing of a memorandum or opinion (appearing at page 108
384 of the State of the Case), and because of the reasons expressed in said opinion. With regard to the title put forward by the defendant, Henry E. Stevens, Jr., it was stated in said opinion as follows:

"In this case title to part of the land thus made is claimed by the defendants in virtue of a riparian grant by the State made June 28, 1900, which antedates the complainants' conveyance."

(State of the Case, p. 109, lines 6 to 10.)

"The defendants admit that the complainants' claim of ownership of the lands made by accretions is disputed, and they deny that the complainants have any title thereto within the lines of the tract acquired from the Bartletts by deed dated April 25th, 1905 (which includes the riparian grant), and that such portion of the lands so conveyed as laid below the high-water line of the Atlantic Ocean as that line existed in May 1900, was conveyed by the State to the Bartletts, under whom they claim, in the riparian grant of June 28th, 1900. In this position they are correct in point of fact, and are also entitled to prevail as matter of law."

(State of Case, page 110, lines 21 to 33.)

3. That said final decree of the Court of Errors and Appeals was entered after the filing of an opinion by the said Court (reported in 90 Atl. 1040), and because of the reasons expressed in said opinion. With regard to the title claimed by the defendant, Henry E. Stevens, Jr., it was set forth in that opinion as follows:

"The defendants claim under a riparian grant from the State on June 28, 1900. * * * In the present case, if the land did not belong to the state, its grant was in effective; if the land belonged to the state at the time of the grant by reason of then being under tide water, but has reverted to its former owners by matters arising after the grant, the complainants are not in the position of question- the grant, but of conceding its validity and claiming that the title thereby granted has since ceased to be effective. * * * Whatever right the former owners might have as against private persons upon the ocean receding was of no avail against the state's riparian grant. The title lost by erosion was then lost forever, unless it was regained by accretion. * * * We think the complainants fail to establish the title set up on the amended bill. The decree of dismissal must therefore be affirmed with costs."

(9 Atl. 1041, to 1042.)

4. The ground for the dismissal by the Chancellor of the complainant's bill, for the affirmation of such action by the Court of Errors and Appeals, was the superior and absolute title of the defendant, Henry E. Stevens, Jr., in the premises in question conveyed by the State's riparian grant, which grant both courts found passed fee simple an absolute title, which was in turn conveyed to the present defendant and the superior title of the defendant, James W. Northup, in the premises in question conveyed by mortgage deed of William H. Bartlett and Elwood S. Bartlett et ux., to the Girard Trust Company.

5. By reason of both and each of the said opinions the defendant, Henry E. Stevens, Jr., was entitled to a decree adjudging that he

had an estate in fee simple absolute in said lands, of which the complainants were in possession, and that he, the defendant, 386 was immediately entitled to the full possession and enjoyment of the said lands; and the defendant James W. Northup was entitled to a decree adjudging that he had a valid and subsisting first mortgage lien upon the said land.

6. But that the final decree entered by the Chancellor as hereinabove referred to was in form merely a general decree of dismissal of the complainants' bill, being in words as follows:

"This matter coming on to be heard on the second day of February, nineteen hundred and twelve, in the presence of Robert H. Ingersoll and George A. Bourgeois, of counsel with the complainants, and of Wilson & Carr, of counsel with the defendants; and the court having heard and considered the proofs, and the arguments of respective counsel; and it appearing to the satisfaction of the court that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill of complaint contained and set forth, and that said bill ought to be dismissed with costs;

It is thereupon on this seventh day of September, nineteen hundred and twelve, on motion of Wilson & Carr, solicitors for and of counsel with the defendants, ordered that the complainants' bill of complaint be and the same is hereby dismissed with costs.

And it is further ordered that a fee of one hundred and fifty dollars be and the same is hereby allowed to the solicitors of the defendants, and the same to be taxed as part of the costs of this suit and to be collectible therewith."

And said decree did not include a statement of the rights of the defendants as enunciated by the opinions of the courts hereinabove referred to, whereby the defendants have been de- 387 prived of the relief to which they were justly and equitably entitled, and which at the time the decree was entered they had the right to demand should be duly embodied in said decree.

Wherefore your petitioners pray that the aforesaid final decree entered in the above entitled cause by the Chancellor on the seventh day of September, nineteen hundred and twelve, be amended to read as follows:

"This matter coming on to be heard on the second day of February, nineteen hundred and twelve, in the presence of Robert H. Ingersoll and George A. Bourgeois, of counsel with the complainants, and of Wilson & Carr, of counsel with the defendants; and the court having heard and considered the proofs, and the arguments of respective counsel; and it appearing to the satisfaction of the court that the complainants have no estate or interest in that part of the lands set forth in the bill of complaint, and more particularly described in paragraph 7a of the answer of the defendant, Henry E. Stevens, Jr., in this cause as follows:

All that certain tract and parcel of land and premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

Beginning at the intersection of the easterly line of New Hampshire Avenue with the fourth course in the description of tract No. 2 as described in paragraph 6*d* of the said answer; thence extending southwardly along the easterly line of New Hampshire Avenue extended to a point in the exterior line established by the

388 Riparian Commissioners where it is intersected by the easterly line of New Hampshire Avenue extended southwardly; thence eastwardly along said exterior line curving to the left on a radius of four thousand feet to where the said exterior line intersects the fourth course of the said description; thence northwestwardly in a straight line to a point intersecting the easterly line of New Hampshire Avenue, being the place of beginning; and that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill contained and set forth, and that said bill ought to be dismissed with costs; and

It further appearing that the defendant Henry E. Stevens, Jr., has an estate in fee simple absolute in said lands, of which the complainants are in possession, and immediately entitled to full possession and enjoyment of the same; and that the defendant, James W. Northup, has a valid and subsisting first mortgage lien upon said land:

It is, thereupon, on this seventh day of September, nineteen hundred and twelve, on motion of Wilson and Carr, Solicitors for and of counsel with the defendants, ordered, adjudged and decreed that the complainants have no estate or interest in the lands set forth in their bill of complaint, and more particularly described above, and that the complainants' bill be and the same is hereby dismissed with costs.

And it is further ordered, adjudged and decreed that the defendant Henry E. Stevens, Jr., has an estate in fee simple absolute in said lands of which the complainants are in possession and that

389 the said defendant is immediately entitled to the full possession and enjoyment of the same.

And it is further ordered, adjudged and decreed that the defendant, James W. Northup has a valid and subsisting first mortgage lien upon said land.

And it is further ordered that a fee of one hundred and fifty dollars be and the same is hereby allowed to the solicitors of the defendants, and the same to be taxed as part of the costs of this suit and to be collectible therewith."

And your petitioner will ever pray, &c.

WILSON & CARR,
Solicitors for Petitioner.

STATE OF NEW JERSEY,
County of Camden, ss:

Harvey F. Carr being duly sworn according to law, on his oath says, that he is a member of the firm of Wilson and Carr, solicitors for Henry E. Stevens, Jr., and James W. Northup, and that he had

in his personal charge the conduct of the litigation referred to in the foregoing petition, and that the matters and things in said petition set forth are true.

HARVEY F. CARR.

Sworn to and subscribed before me this twenty-first day of September, A. D. 1915.

WALTER R. CARROLL,
Notary Public of New Jersey.

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EXHIBIT D2.

Deed.

No. 10.

The Atlantic City Beach Front Improvement Co. to William H. Burkard.

Dated November 9th, 1899.

Recd. November 13th, 1899.

Book 238, page 204.

Consideration \$1.

Grant to ——— and assigns.

Habendum to heirs and assigns.

Proven November 9th, 1899, in Atlantic County, before G. A. Bourgeois, Master in Chancery by Clifton C. Shinn, Secretary of The Atlantic City Beach Front Improvement Company.

Conveys the following:

Beginning at Southwest corner of New Hampshire and Oriental Avenues, and extending thence West by Oriental Avenue 175 feet; thence South at right angles with Oriental Avenue 50 feet, more or less, to high water mark of the Atlantic Ocean; thence East by same 188 feet, more or less, to West line of New Hampshire Avenue; thence North by same 24 feet, more or less, to the place of beginning.

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EXHIBIT D3.

Deed.

No. 11.

The Atlantic City Beach Front Improvement Co. to William H. Burkard.

Dated November 9th, 1899.

Recd. November 29th, 1899.

Book 240, page 99 &c.

Consideration \$1,000.

Grant to heirs and assigns.

Habendum to heirs and assigns.

Proven November 24th, 1899, in Atlantic County, before Robert E. Stephany, Master in Chancery, by Clifton C. Shinn, Secretary of The Atlantic City Beach Front Improvement Co.

Conveys the following:

Beginning at the Southwest corner of New Hampshire and Oriental Avenues, and extending thence West by Oriental Avenue 175 feet; thence south at right angles to Oriental Avenue 50 feet, more or less, to high water mark in the Atlantic Ocean; thence East by same 188 feet, more or less, to the West line of New Hampshire Avenue; thence North by same 24 feet, more or less, to beginning.

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EXHIBIT D4.

Deed.

No. 12.

William H. Burkard, Mary L., His Wife, to William H. Bartlett,
Elwood S. Bartlett.

Dated November 9th, 1899.

Recd. November 29th, 1899.

Book 237, page 387.

Consideration \$48,000.

Grant and habendum to heirs and assigns.

Acknowledged November 24th, 1899, in Atlantic County, before John C. Risley, Commissioner, by parties of the first part.

Conveys the following:

No. 1. Beginning at the Northwest corner of New Hampshire and Oriental Avenues (400 feet South of Pacific Avenue) and extending thence West by Oriental Avenue 175 feet; thence North parallel with New Hampshire Avenue 250 feet; thence East parallel with Oriental Avenue 15 feet; thence South parallel with Oriental Avenue 160 feet to the West line of New Hampshire Avenue; thence South by same 150 feet to beginning.

No. 2. Beginning at the Southwest corner of New Hampshire and Oriental Avenues, and extending thence West by Oriental Avenue 175 feet; thence South at right angles to Oriental Avenue 50 feet, more or less, to high water mark of the Atlantic Ocean; thence East by same 188 feet, more or less, to the West line of New Hampshire Avenue; thence North by same 24 feet, more or less, to beginning.

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EXHIBIT D6.

I hereby certify, that the within is a true copy of Grant by the State of New Jersey to William H. Bartlett and Elwood S. Bartlett,

dated June 28th, 1900, and recorded in the office of the Riparian Commission of New Jersey in Liber N., page 245 &c.

[SEAL.]

JOHN C. PAYNE,

Secretary Riparian Commission of New Jersey.

May 1st 1911.

THE STATE OF NEW JERSEY:

To all to whom these presents shall come or may concern, Greeting:

Whereas, Pursuant to an act of the Legislature of said State, approved March 21st, 1871, entitled "A further supplement to an act entitled 'An act to ascertain the rights of the State and of Riparian owners in the lands lying under the waters of the bay of New York and elsewhere in this State,'" approved April eleventh, one thousand eight hundred and Sixty-four, and other acts and joint resolutions of the Legislature of said state, William H. Bartlett and Elwood S. Bartlett, of the City of Atlantic City in the County of Atlantic and State of New Jersey, being the owners of lands fronting on the Atlantic Ocean in the City of Atlantic City in the County of Atlantic and State of New Jersey, which lie above high water mark and in front of which the lands under water hereinafter described are situated, has applied to the Riparian Commissioners of said State

394 for a grant of the said lands under water, and to have the said Commissioners fix the boundaries of the said lands under water, and determine the price or compensation to be paid to the said State therefor, and the terms and conditions of said grant:

And Whereas, the said Riparian Commissioners to wit: Foster M. Voorhees, Governor, Willard C. Fisk, William Cloke, John I. Holt and John J. Farrell, having due regard to the interest of navigation and the interests of the State, have agreed to grant the lands under water hereinafter mentioned upon the terms herein set forth, and have determined the sum of Nine Hundred and Thirty 00-100 (\$930.00) Dollars, as the price or reasonable compensation to be paid to the State for the said lands.

Now Therefore, the said State of New Jersey, by the said Riparian Commissioners, the Governor approving, in consideration of the premises, the terms and conditions hereinafter contained, and the said sum of Nine Hundred and Thirty 00-100 (\$930.00) Dollars duly paid by the said William H. Bartlett and Elwood S. Bartlett to the said State, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey, subject to the terms, covenants, conditions and limitations herein contained, unto the said William H. Bartlett and Elwood S. Bartlett and to their heirs and assigns forever—All that parcel of land flowed by tide water lying at Atlantic City, in the County of Atlantic and State of New Jersey described as follows:

Beginning at a point in the high water line of the Atlantic Ocean as the same existed in May, 1900, said point being distant 325 feet southerly at right angles from the southerly line of Pacific Avenue

and 175 feet easterly at right angles from the easterly
 395 line of Vermont Avenue, and from said beginning point
 southerly parallel with Vermont Avenue and distant 175 feet
 easterly at right angles from the easterly line of the same, 185 feet
 to a point in the easterly line of lands under water granted by the
 State of New Jersey to Walter B. Dick, December 28th, 1899; thence
 southeasterly in a straight line and along the easterly line of lands
 as above granted to Walter B. Dick 729 38-100 feet to a point in the
 Exterior Line established by the Commissioners appointed under the
 authority of the act entitled "An Act to ascertain the rights of the
 State and of Riparian owners in the lands lying under the waters
 of the bay of New York and elsewhere in this State" approved April
 11th, A. D. 1864 and the supplements thereto; said point being
 distant 378 feet northeasterly along said Exterior Line from where
 it is intersected by the easterly line of Vermont Avenue extended
 southerly; thence northeasterly along said Exterior Line curving
 to the left on a radius of 4,000 feet, 494 feet to a point; thence north-
 westerly in a straight line 744 39-100 feet to a point in the high
 water line of the Atlantic Ocean where the same is intersected by
 the westerly line of New Hampshire Avenue said point being distant
 250 feet southerly from the southerly line of Pacific Avenue; thence
 southwesterly along said high water line to the place of beginning.

Subject, however, to such right, title and interest in and to the
 premises hereby conveyed as were conveyed in and by a certain grant
 or conveyance made by the State of New Jersey to the United States
 of America dated August 17th, 1878, and recorded in the office of
 the Riparian Commission of the State of New Jersey in Liber D.
 page 260.

With the right and privilege, under the covenants and con-
 396 ditions of this grant, to exclude the tide-water from so much
 of the lands above described as lie under tide-water by filling
 in or otherwise improving the same, and to appropriate the lands
 under water above described to their exclusive private uses.

(The following eight lines erased)

(1) And also under like terms, covenants, conditions and limi-
 tations, all and singular (2) the lands under water lying between the
 exterior line for solid filling and the exterior (3) line for piers, as
 fixed by the Commissioners appointed under the authority of the
 act (4) aforesaid and the supplements thereto, and bounded by
 the — and (5) — lines of the first described tract extended — (6)
 to said pier line; but said land last described is not to be used for
 any purpose whatsoever (7) except the erection of a pier or piers
 thereon, underneath which the tide may ebb and (8) flow, and no
 solid filling shall be placed thereon.

Provided, that the State of New Jersey, by its Riparian Com-
 missioners or any other lawful authority, may, from time to time,
 change the exterior lines for solid filling and piers, and fix the same
 further from the shore than formerly, even though such action may
 affect the lands hereby granted, whenever the State may deem it
 necessary for its interest so to do; and if such exterior lines shall
 be placed out further from the shore than formerly, then the party

or parties claiming under this instrument may, within such period as may be fixed by the State, either through said Riparian Commissioners or any other lawful authority, have the exclusive right to apply for and receive a lease or grant of the additional land under water lying between the present exterior lines above described and the new exterior line or lines that may hereafter be fixed, upon payment of such additional rental or compensation, and upon such terms, as shall be fixed by said Commissioners or other lawful authority, under any present or future law of this State; such additional land to be used for solid filling and for piers respectively as directed by the said Commissioners or their successors, or other lawful authority, under any present or future law of this State.

And Also Provided, that the State of New Jersey may grant or lease any of the lands of the State lying in front of the exterior line for solid filling or piers mentioned or referred to herein, for the cultivation of oysters or other fish, or for any other purpose whatever, provided that such grant or lease shall not operate to interfere with the reasonable use of, and access by water to the lands under water hereby granted, and with the free and uninterrupted navigation between said lands under water and the main channel of the said Ocean.

And Also Provided, that if the said William H. Bartlett and Elwood S. Bartlett are not the owners of the land adjoining the land under water hereby granted, then and in that event this instrument and conveyance, so far as the same binds the State, and all the covenants herein on the part of the State, shall be void as affecting any part or parts of said land which joins land not owned by the said, William H. Bartlett and Elwood S. Bartlett.

And Also Provided, that if the exterior line for solid filling and the exterior line for piers, or either of said lines, now established, or lines that may be hereafter established by the Riparian Commissioners or other lawful authority of the State of New Jersey, shall be hereafter changed by the action of the authorities of the

United States Government, and the grantee herein or any party claiming hereunder shall suffer damages, the claim or claims therefor must be made against the authorities of the United States Government, and not against the State of New Jersey.

Together with all and singular the hereditaments and appurtenances thereunto belonging.

To have and to hold all and singular the above granted and described lands under water and premises, subject to the terms, conditions and limitations aforesaid, unto the said William H. Bartlett and Elwood S. Bartlett and to their heirs and assigns forever.

NOTE.—Eight printed lines on 3rd page erased before execution.

JOHN C. PAYNE.

In Witness Whereof, The said Commissioners have hereunto respectively set their hands, and these presents have been signed by the Governor, and the Great Seal of the said State has been hereunto

affixed and attested by the Secretary of State, this twenty-eighth day of June in the year nineteen hundred.

FOSTER M. VOORHEES,
Governor.

WILLARD C. FISK.

JOHN I. HOLT.

WM. CLOKE.

JOHN J. FARRELL.

Witness:

JOHN C. PAYNE.

Attest:

[The Great Seal of the State of New Jersey.]

GEORGE WURTS,
Secretary of State.

399 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, That on this twenty-ninth day of June nineteen hundred 1900 before me the subscriber a Master in Chancery of New Jersey personally appeared John C. Payne who being by me duly sworn on his oath, saith that he saw Foster M. Voorhees, Governor, Willard C. Fisk, William Cloke, John I. Holt and John J. Farrell, the within named Commissioners, sign and deliver the within deed as their voluntary act and that he, the said John C. Payne thereupon subscribed his name as an attesting witness thereto.

JOHN C. PAYNE.

Sworn and subscribed before me, at Jersey City the day and year aforesaid.

GEORGE L. RECORD,
Master in Chancery of New Jersey.

(Endorsed on Back:) Copy. Riparian Commission of New Jersey. Recorded in Liber N, Folio 245 &c. The State of New Jersey to William H. Bartlett and Elwood S. Bartlett. Grant. Dated June 28th, 1900.

400

EXHIBIT D7.

This indenture, made the Twenty-fifth day of April in the year of our Lord One Thousand Nine Hundred and five (1905) Between William H. Bartlett (single man), Elwood S. Bartlett and Ellen I. his wife, all of Atlantic City, in the County of Atlantic and State of New Jersey, parties of the first part, and Henry E. Stevens, Jr., of the City and State of New York, party of the second part.

Witnesseth, that the said parties of the first part, for and in consideration of the sum of One Dollar and other valuable considera-

tions lawful money of the United States of America, well and truly paid by the said party of the second part, to the said parties of the first part, at and before the en sealing and delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, enfeofed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeof, release, convey and confirm unto the party of the second part, his Heirs and Assigns, all the following described lots of lands and premises, situate, lying and being in the City of Atlantic City, in the County of Atlantic and State of New Jersey, and bounded and described as follows:

Beginning in the Westerly line of New Hampshire Avenue, Two Hundred and Fifty (250) feet Southward from the Southerly line of Pacific Avenue; thence Westwardly, parallel with Pacific Avenue, One Hundred and Sixty (160) feet; thence Northwardly, parallel with New Hampshire Avenue, One Hundred (100) feet; 401 thence Westwardly, parallel with Pacific Avenue, Fifteen (15) feet; thence Southwardly parallel with New Hampshire and Vermont Avenues, Two Hundred and Fifty (250) feet to the Northerly line of Oriental Avenue; thence continuing the same course, parallel with said New Hampshire and Vermont Avenues, and crossing Oriental Avenue and high water line to the exterior line of the Riparian Commissioners; thence along said exterior line, curving to the left with a radius of four thousand feet, six hundred and seventy feet, more or less, to the Easterly line of a grant made by the State of New Jersey, by the Governor and Riparian Commissioners, to William H. Bartlett and Elwood S. Bartlett, dated June 28th, 1900, and recorded in Book 248, page 475; Thence North-westwardly, in a straight line, being the Easterly line of the lands described in such grant, crossing high water mark, and Oriental and New Hampshire Avenues, to the place of beginning.

The above described lands being, so far as that portion thereof which lies below high water mark is concerned, subject to the provisions, conditions and agreements contained in two several grants.

Together with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof: And Also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said parties of the first part, of, in, and to the premises, with the appurtenances.

To have and to hold the said premises, with all and singular the appurtenances, unto the party of the second part his Heirs 402 and Assigns, to the only proper use, benefit and behoof of the said party of the second part his Heirs and assigns, forever:

And the said William H. Bartlett and Elwood S. Bartlett, for themselves, their and each of their Heirs, Executors and Administrators do by these presents covenant, grant and agree to and with the said party of the second part, his Heirs and Assigns, that they the said William H. Bartlett and Elwood S. Bartlett, their and each

of their Heirs, all and singular the hereditaments and premises hereinabove described and granted, or mentioned and intended to be so, with the appurtenances unto the said party of the second part, his Heirs and Assigns, against them the said William H. Bartlett and Elwood S. Bartlett, their and each of their Heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and forever defend.

In witness whereof, the said parties of the first part to these presents hereunto set their hands and seals dated the day and year first above written.

WILLIAM H. BARTLETT. [S.]
 ELWOOD S. BARTLETT. [S.]
 ELLEN I. BARTLETT. [S.]

Signed, Sealed and Delivered in the presence of
 F. C. ROBBINS.

STATE OF NEW JERSEY,
Atlantic County, ss:

Be it Remembered that on this Twenty Fifth day of April in the year of our Lord one thousand Nine Hundred and Five, before me, a Commissioner of Deeds for New Jersey, personally appeared William H. Bartlett, Elwood S. Bartlett and Ellen I. Bartlett, who, I am satisfied, are the grantors mentioned in the above deed or conveyance, and I having first made known to them the contents thereof, They acknowledged that they signed, sealed and delivered the same as their voluntary act and deed; and the said Ellen I. Bartlett being of full age, on a private examination, apart from her said husband, before me acknowledged that She signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband, all of which is hereby certified.

FREDERICK ROBBINS,
Commissioner of Deeds.

Deed. William H. Bartlett et als. to Henry E. Stevens, Jr. Dated April 25, 1905. Received May 6th 1905, and recorded in the Clerk's Office of Atlantic County, at 8.12 A. M. in Book 316 of Deeds, Folio 487 &c. Lewis P. Scott, Clerk. Chg. West Jersey Title and Guaranty Company.

405 In the United States Circuit Court of Appeals for the Third
Circuit, March Term, 1921.

No. 2642.

HENRY E. STEVENS, JR., Appellant,

vs.

ARTHUR S. ARNOLD et al., Appellees.

And afterwards, to-wit, on the twenty-first day of April, 1921, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. Victor B. Woolley and Hon. J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the second day of August, 1921, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

406

Opinion.

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1921.

No. 2642.

HENRY E. STEVENS, JR., Appellant,

vs.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and REAL ESTATE TITLE
Insurance and Trust Company of Philadelphia, Executors &
Trustees under the Will of Samuel F. Nirdlinger, Deceased,
Appellees.

On Appeal from the District Court of the United States for the
District of New Jersey.

Per Curiam:

This suit, instituted in the District Court to try the title to land made by accretions to fast-land on the ocean-front of Atlantic City, was brought under a statute of New Jersey (4 Comp. Stat. 5399) providing procedure almost the precise opposite of that of the common law action of ejectment. It followed a like action brought with respect to the same land in the state court (Dewey Land
407 Co. vs. Stevens, 83 N. J. Eq. 314) and there dismissed. The decree from which this appeal is taken overruled the defense of res adjudicata and determined the title to the land in question—in so far as it was affected by the claim of the defendant—to be in the plaintiff. The principles on which this decree was grounded

were given by Judge Haight in an opinion written with great care and elaboration. 262 Fed. 591. As we are in complete accord with all his views we find no occasion to repeat them in an opinion of our own. We therefore affirm the decree below on the opinion filed.

Endorsements: 2642. Opinion Per Curiam. Received & Filed Aug. 2, 1921. Saunders Lewis, Jr., Clerk.

408

Mandate.

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1921.

No. 2642 (List No. 22).

HENRY E. STEVENS, JR., Appellant,

vs.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and REAL ESTATE TITLE Insurance and Trust Company of Philadelphia, Executors & Trustees under the Will of Samuel F. Nirdlinger, Deceased, Appellees.

Appeal from the District Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

Philadelphia, August 2, 1921.

VICTOR B. WOOLLEY,
Circuit Judge.

Endorsements: 2642. Order Affirming Judgment. Received & Filed Aug. 2, 1921. Saunders Lewis, Jr., Clerk.

409 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of New Jersey, Greeting:

Whereas, lately in the District Court of the United States for the District of New Jersey, before you or some of you, in a cause between Henry E. Stevens, Jr., (defendant below) Appellant, and Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance & Trust Company of Philadelphia, Executors and Trustees under the Will of Samuel F. Nirdlinger, Deceased, (plaintiffs below)

a decree was entered in the said District Court on the twenty-fourth day of May, 1920, which decree is of record in the office of the Clerk of said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof.

409½ as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

410 And whereas, in the present term of March, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs; and that the said Appellees, Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance & Tr. Co. of Phila., executors and trustees under the will of Samuel F. Nirdlinger, deceased, recover against the said Appellant, in the sum of Twenty Dollars (\$20) for their costs herein expended, and have execution therefor.

Philadelphia, August 2, 1921.

411 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the second day of September, in the year of our Lord one thousand nine hundred and twenty-one (1921).

SAUNDERS LEWIS, JR.,

Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Costs of Arthur S. Arnold et al.:

Clerk.....	\$—.—
Printing Record	\$—.—
Attorney.....	\$20.00
	<hr/>
	\$20.00

[Endorsed:] Original File No. 2642. U. S. Circuit Court of Appeals, Third Circuit, March Term, 1921. No. 22. Henry E. Stevens, Jr., Appellant, vs. Arthur S. Arnold et al., Appellees. Copy of Mandate. Received & Filed Sep. 2, 1921. Saunders Lewis, Jr., Clerk.

412 & 413 *Certificate Clerk Circuit Ct. of Appls.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original record and proceedings of this Court in the case of: Henry E. Stevens, Jr., Appellant, vs. Arthur S. Arnold, et al., Appellees, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 13th day of October in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-fifth.

[Seal of the United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

414 United States Circuit Court of Appeals for the Third Circuit.

HENRY E. STEVENS, JR., Petitioner,

VS.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and REAL ESTATE TITLE Insurance and Trust Company of Philadelphia, Executors and Trustees under the Will of Samuel F. Nirdlinger, Deceased, Respondents.

On Certiorari.

Stipulation.

It is stipulated by and between counsel herein, that the certified copy of the transcript of the record now on file in this court may be taken and considered as a return to the writ of certiorari issued herein.

Dated, January 19, 1922.

HARVEY F. CARR,
Attorney for Petitioner.
GEO. A. BOURGEOIS,
H. R. COULOMB,
BOURGEOIS & COULOMB,
Attorneys for Respondents.

Endorsements: 2642. Stipulation of Counsel as a Return to Writ of Certiorari, Received & Filed Jan. 23, 1922. Saunders Lewis, Jr., Clerk.

415 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed in this Court as return to writ of certiorari in the case of: Henry E. Stevens, Jr., vs. Arthur S. Arnold, et al., No. 2642, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 27th day of January in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-sixth.

[Seal of the United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

416 UNITED STATES OF AMERICA, 88:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Henry E. Stevens, Jr., is appellant, and Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, Executors and Trustees under the Will of Samuel F. Nirdlinger, deceased, are respondents, No. 2642, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of New Jersey, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be

certified by the said Circuit Court of Appeals and removed
417 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of December, in the year of our Lord one thousand nine hundred and twenty-one.

WM. A. STANSBURY,

Clerk of the Supreme Court of the United States.

418 [Endorsed:] File No. 28,553. Supreme Court of the United States, October Term, 1921. No. 598. Henry E. Stevens, Jr., vs. Arthur S. Arnold, Abram L. Erlanger, et al. Writ of Certiorari.

419 & 420 [Endorsed:] File No. 28,553. Supreme Court U. S., October Term, 1921. Term No. 598. Henry E. Stevens, Jr., Petitioner, vs. Arthur S. Arnold, et al. Writ of Certiorari and return. Filed Jan. 28, 1922.

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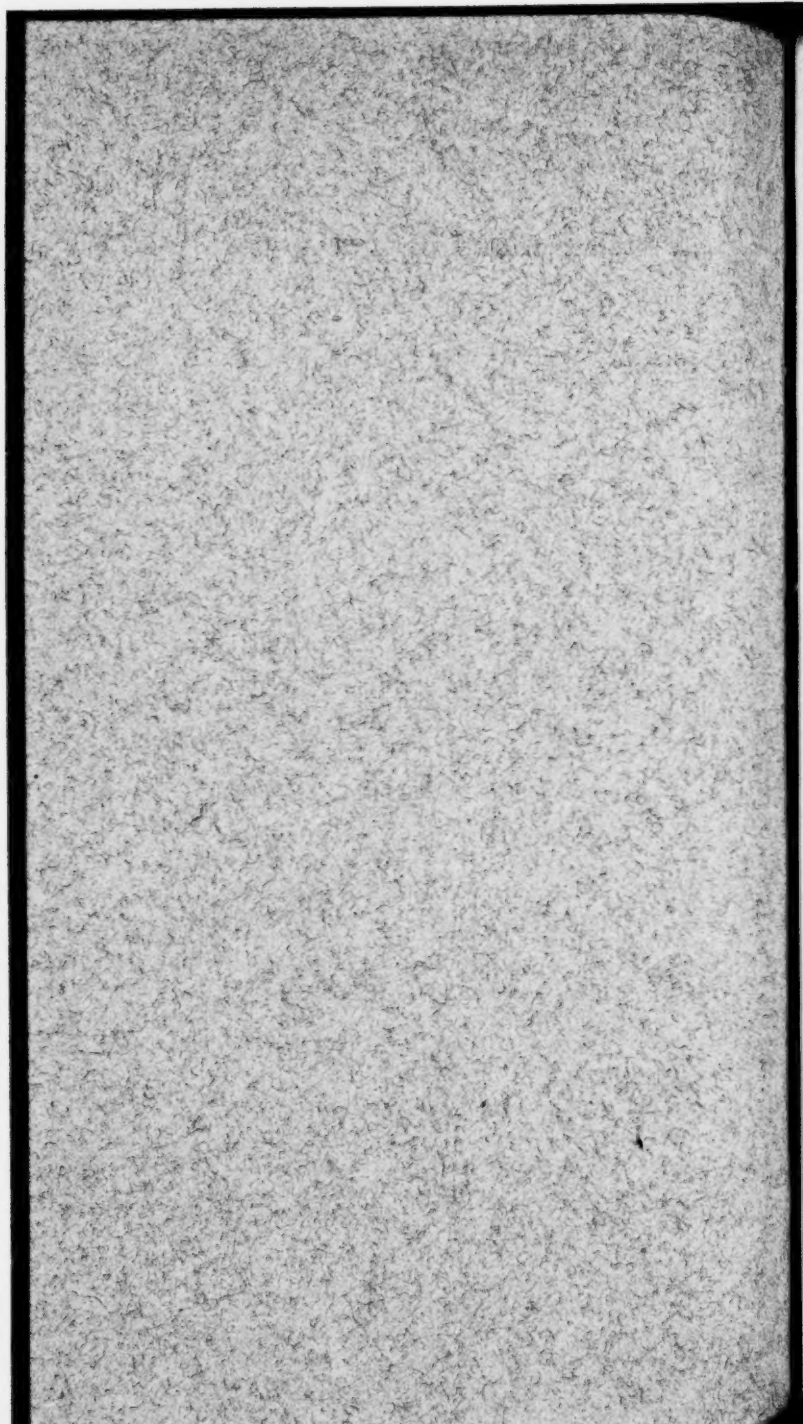
UNITED STATES SUPREME COURT

October Term, 1921.

HENRY E. STEVENS, Jr.,
Petitioner,

VS.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER
and **REAL ESTATE TITLE INSURANCE**
AND TRUST COMPANY OF PHILADEL-
PHIA, Executors and Trustees under the Will
of **SAMUEL F. NIRDLINGER, Deceased,**
*Respondents.***ON PETITION FOR WRIT OF CERTIORARI**
to Review Decree of the Circuit Court of Appeals
Affirming Decree of the United States District
Court for the District of New Jersey**PETITIONER'S BRIEF****HARVEY F. CARR,**
Attorney for and of Counsel
with Henry E. Stevens, Jr.,
Petitioner.



SUPREME COURT OF THE UNITED STATES

HENRY E. STEVENS, JR.,

Petitioner,

vs.

ARTHUR S. ARNOLD, ABRAM
L. ERLANGER and REAL
ESTATE TITLE INSURANCE
AND TRUST COMPANY OF
PHILADELPHIA, Executors
and Trustees under the
Will of SAMUEL F. NIRD-
LINGER, deceased,

Respondents.

} On Petition for Writ
of Certiorari to Re-
view Decree of Cir-
cuit Court of Ap-
peals for the Third
Circuit.

BRIEF FOR PETITIONER.

This is a petition for a writ of certiorari to review a final decree of the Circuit Court of Appeals for the Third Circuit, affirming a decree of the United States District Court for the District of New Jersey overruling the defense of *res judicata* set up by Stevens, the appellant, and also adjudging the appellant to have no right, title or interest, etc., in and to certain lands and premises in dispute in this action. (For convenience, the designation "Appellant" is used throughout this brief to designate the "Petitioner" in this court, and in order that the designation of the parties in the Circuit of Appeals

may be preserved without change.) The bill was filed by the respondent to quiet title to certain lands along the Atlantic Ocean at Atlantic City, and was based primarily on the New Jersey statute entitled, "An Act to compel the determination of claims to real estate in certain cases and to quiet title to the same" (4 N. J. C. S., 5399).

The *locus in quo* borders on the high water mark of the Atlantic Ocean and has been formed by accretions or alluvion.

A bill was filed in the New Jersey Court of Chancery on October 2, 1909, against the same defendant and praying for the same relief in respect to the same property. The original bill claimed the *locus in quo* by reason of accretions "in front of said tract of land by alluvial deposits." An amended bill was filed in which the claim based upon accretions was abandoned and a claim based upon deeds executed by Jno. McClees and the heirs of Robert B. Leeds (a former owner) was substituted. At the final hearing in the Court of Chancery this amendment was made, and the defendant in that suit (Stevens) applied for, and was granted, permission to answer the amended bill, and also to include in the defendant's claim of title based upon a riparian grant, a claim by accretions. (See State of the Case, *Dewey Land Co. vs. Stevens*, p. 24.) In the Chancery suit the defendant there (Stevens) claimed under a riparian grant from the State of New Jersey as well as by accretions. After a hearing on the merits in the Court of Chancery an order was entered dismissing the bill of complaint, which order in part reads as follows:

"And it appearing to the satisfaction of the Court that the complainants are not entitled to any relief whatsoever by reason of the matters

and things in their bill of complaint contained and set forth, and that the said bill ought to be dismissed with costs:

"It is, thereupon, etc., ordered that the complainants' bill of complaint be and the same is hereby dismissed with costs."

From this final order or decree an appeal was taken to the New Jersey Court of Errors and Appeals, which latter court after a hearing on the merits entered a decree of affirmance, and remitted the record to the Court of Chancery.

Subsequently the bill in the case *sub judice* was filed, and in the answer the defense of *res judicata* was set up in bar of the action as well as a defense on the merits based upon the riparian grant from the State of New Jersey and the claim by accretions.

The appellant and respondent are co-terminus owners of lands bordering on the Atlantic Ocean, their lots being located on opposite sides of New Hampshire Avenue, which runs in a generally southerly direction.

The facts with relation to the claim on the merits will be discussed in a subsequent portion of this brief.

RES JUDICATA.

Before discussing the opinion of Judge Haight it will be well to consider the nature of a suit to quiet title under the New Jersey statute. Under the statute it is only incumbent upon the complainant in such a suit to set up the jurisdictional facts of peaceable possession, a hostile claim, and the

fact that no suit is pending to enforce such claim. These facts being established the court has jurisdiction to determine the controversy and the defendant is required to assert, set forth, and establish his title or claim. Failing to do all of these things it is adjudged that he has no title or claim. Upon the establishment of the jurisdictional grounds the position of the defendant in the suit is shifted so that he becomes in effect a plaintiff in an ejectment suit. *Fittichauer vs. Metropolitan Fireproofing Co.*, 70 N. J. Eq. 429, 431. In other words, if the defendant makes no proofs the complainant succeeds by virtue of his possessory title.

Obviously a title by possession is better than no title, so that in order for a defendant to defeat the complainant in such a suit he must show and prove a title superior to the complainant's title by possession. Hence any adjudication or determination of the Court that the complainant is not entitled to relief carries with it as a necessary corollary the fact that the defendant has asserted and proved a title superior to that exhibited and proved by the complainant in such a suit. Of course, the doctrine of *res judicata* applies not only to the claim or demand in controversy concluding the parties and those in privity with them, not only as to any matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. See *Cromwell vs. County of Sac.*, 94 U. S. 351.

It is perfectly obvious that in the Chancery suit not only was opportunity afforded to the complainant to base his claim upon accretions, but such claim was actually made by him and abandoned. He is, therefore, concluded in that suit, as well as in this, as to such claim.

The opinion of Judge Haight waives this aside simply by the single sentence: "But this is a *non sequitur*." But is it? Bearing in mind that if the defendant establishes no claim superior to that of the complainant's title by possession the defendant is defeated in the action, is it not inevitable that the Court of Errors and Appeals was compelled to balance the defendant's title as against the complainant's? And did this not necessarily involve a determination that the title asserted by the defendant under its riparian deed was superior to the complainant's title by possession? Did it not, so far as the law of the case is concerned, necessarily involve a determination as to the validity of the defendant's title under the riparian grant? If the riparian grant conferred no title upon the defendant, then the complainant was entitled to a decree of reversal adjudging that the defendant was entitled to no interest in the land.

The learned trial Judge then indulges in the following conjectures:

"It may be that the decision has established a new jurisdictional requirement, viz: That the plaintiff must establish some kind of title to the land in controversy before the defendant is required to set forth and establish his claim, and in the event of his failure so to do the Court is not at liberty to entertain a bill filed under the statute in question."

The nature of the statutory action is discussed with great clearness by Vice-Chancellor Stevenson in *Fittichauer vs. Metropolitan Fireproofing Co.*, *supra*. In that case the Court said:

"Complainant is under no obligation even to exhibit his own title until after the defendant has shown title."

This must be so, because until the defendant avers and proves a superior title the complainant would recover under his title by possession.

In view of the somewhat elaborate discussion of the rights of the defendant under his riparian grants from the state, two opinions having been filed in the cause, it is difficult to perceive why, if the Court desired to establish a new jurisdictional requirement in conflict with the statute and the adjudicated cases it would not have said so in plain and unmistakable language, and if this was its purpose the discussion of the rights of the defendant under the riparian grant appears to have been an idle waste of time on the part of an otherwise busy and industrious Court.

The second conjecture of the learned trial Judge is as follows:

"On the other hand its action in merely affirming the dismissal of the bill may have been due to the fact that upon examining the record it found that the deeds relied upon by the complainants conferred no title upon them, and consequently it adopted a *practical and convenient* way of disposing of the case, and thus rendering it unnecessary for it to determine whether or not the defendant had any interest in the land, and hence it advisedly merely dismissed the bill; the complainants being treated rather as interlopers without a shadow of title."

It is difficult to understand why the second conjecture should be prefaced by "on the other hand." The conjecture in its nature is practically the same as the first conjecture, and entirely ignores the fact that no complainant who establishes possession, and against whom a higher title is not asserted and

proved, is an "interloper," but on the contrary is entitled to a decree adjudging that his adversary has no right, claim or demand upon the *locus in quo*.

The cases cited in the opinion, and also previously cited by counsel for the respondents, all deal with questions where the appeal was dismissed for want of jurisdiction. The Court of Chancery, in its opinion, found as a fact that "the jurisdictional facts of peaceable possession in the complainant and no suit pending, are present."

A "practical and convenient way of disposing of the case" would have been for the Court to have said: "The court below was without jurisdiction to entertain this bill because certain jurisdictional facts (specifying them) are not established in this case." This course would have saved the Court much labor and research on the riparian grants involved. It could not have said this, however, because all of the jurisdictional facts prescribed by the statute were established.

It seems to us impossible to read the opinion of Justice Swayze and of Judge White in the New Jersey Court of Errors and Appeals and reach the conclusion that this case was not decided in that court on the ground that the defendant's riparian claim was superior to the complainant's claim. Indeed, the third syllabus in that case says:

"HELD: That plaintiffs could not sustain their claim to the land under the grants to the former owners as *against the state's riparian grant*."

It appears in the opinion of Mr. Justice Swayze that the bill originally filed claimed title by accretion, and that this claim was abandoned, and by an amended bill the complainant set up title by deed from former owners.

The reason why the claim for accretion was not tried in the Chancery suit was because of its voluntary abandonment by the complainant therein. He had full and fair opportunity to litigate that question in the Chancery suit. He chose, however, to abandon it, but he is bound to the same extent as though he had actually litigated the case on the theory of accretions. He has no right to reopen litigation which is closed by the final decree of a Court of Last Resort. He has no right to relitigate a controversy settled by the decree of the Court of Last Resort in order to try the case upon a ground voluntarily abandoned by him in the first suit. Litigation would be unending if litigants are to be accorded a right to try the case repeatedly upon grounds that were available in the first suit.

In the opinion below the learned trial Judge said:

"I accordingly conclude that the New Jersey decree is not *res adjudicata* of the questions in this case. If a contrary conclusion was reached there would be presented a situation where, although the title or interest of the defendant had never been settled, neither party would ever be able to procure a decree under the statute setting at rest the title to the land. Indeed the practical effect would be to confirm the defendant's claim of title to land of which the complainant was and is in peaceable possession, not because it had ever been so decreed by any court, but because in a previous suit the complainant had failed to establish his title."

This seems to beg the question. If this Court is of the opinion that this case was tried on its merits in the Court of Chancery and the Court of Errors and Appeals of New Jersey, and that the determin-

ation of such case necessarily adjudged that the defendant's claim was superior to that of the complainant, then the matter is *res judicata*, be the inconvenience what it may. If the doctrine of *res judicata* is established it would not be a difficult matter for the appellant out of possession, whose rights had been adjudged to be superior to those of the person in possession, to obtain judicial relief in the proper forum and by the proper proceedings. It might be suggested that a suit in ejectment would be available as an effective means to accomplish the desired result.

In disposing of the defense of *res judicata* the sole question is: Did the New Jersey Court of Chancery and the Court of Errors and Appeals determine the case on the merits, and did it find that the defendant's title was superior?

The plaintiff says the matter is not *res judicata* because—(a) The plaintiff's claim by accretions was not passed upon in the New Jersey suit. (b) Because the present suit is a *quia timet* suit for the purpose of removing a cloud upon the title, and under the general equity power of the Court as distinguished from a suit under the New Jersey statute.

Are these reasons sound? and do they differentiate this suit from the New Jersey suit? Is there anything in this suit that could not and should not have been tried in the New Jersey suit?

The purpose of an equity suit is best determined by an examination of the prayer for relief. The prayer in the original bill filed in the New Jersey

Court of Chancery, so far as it is here relevant, reads as follows:

"To the end, therefore, that the defendants may, in manner aforesaid, answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they or either of them make or claim, and to what part or what interest; and further how, and by what instrument such title is claimed or derived or was created; and that by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and that your orators may be decreed to have a perfect title thereto, and the defendants to have no estate, interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void."

Appeal Record, pages 31 and 32.

The prayer in the amended bill is identical with that of the original bill. (*Appeal Record*, p. 38.)

The prayer in the bill *sub judice* is identical in substance with the prayer of the other two bills, except that there is added thereto the following:

"And that the cloud upon the title of your orator to said lands and premises created and occasioned by the alleged riparian grant hereinabove referred to, and the deed of conveyance from William H. Bartlett and Elwood S. Bartlett and wife to the defendant hereinabove referred to may be, so far as said lands and premises are concerned, declared and decreed to be null and void, and of no effect as against your orator, and that your orator's right in and

title to said lands and premises may be decreed to be relieved from the lien or cloud occasioned by the said alleged riparian grant and deed of conveyance, and that the said defendant, Henry E. Stevens, Jr., may be likewise decreed to have no title or interest in or to said lands and premises by reason of said alleged riparian grant and deed."

The additional matter at best is but surplus verbiage. Without the added matter the plaintiff prayed that he might be decreed to have a perfect title and the defendant to have no estate, interest in, or encumbrance upon the said lands, etc. No additional force is given to the prayer which asks that the defendant be decreed "to have no estate, interest in, or encumbrance upon the said lands and premises by reason of said alleged riparian grant and deed." It is axiomatic that the greater includes the less. Indeed, Judge Haight, in his opinion, says:

"Sometime prior to the institution of this suit the present plaintiff and a corporation known as the Dewey Land Company, being at that time tenants in common of the land in question, brought a suit in the Court of Chancery of New Jersey under the same statute against the *same* defendant and therein sought the *same* relief in respect to substantially the *same* property as is sought in the present suit, except that the prayer for relief in the bill in the former suit did not, as does the bill in the present suit, specifically pray for the removal of the before mentioned alleged cloud upon the title" —

the "alleged cloud" being the claim under the riparian deeds set up by the defendant in the New Jersey suit.

The principal ground advanced by the plaintiff why the New Jersey decree was not *res judicata* is the following appearing upon the complainant's brief in the court below:

"The issues in a bill to quiet title under the statute are determined by the defendant. The title that he asserts, whether one or more, constitutes the issue or issues in the cause. Under the statute *there is no opportunity for the complainant to alter or vary the issue*, to wit, the title claimed by the defendant, hence it is beside the question for defendant now to assert that complainant should have litigated some claim not litigated in that suit."

Is this assumption well founded? Bearing in mind that the statutory suit to quiet title is in effect a suit in ejectment, with the parties standing in the reverse order, and that the defendant is, therefore, the plaintiff in ejectment, can it seriously be contended that the issue is limited solely to the examination of the title presented by the defendant (plaintiff in ejectment), and that no opportunity is given to the opposite party to show a superior title? If the issue to be tried is: "Is the title or right of the defendant superior to that of the complainant?" then manifestly the Court must examine all of the claims of both of the parties to the suit. It is only upon the theory that the Court in a suit to quiet title does *not* try all of the claims between the parties, and does *not* permit the complainant to assert all of his claims that the complainant's contention would be entitled to any weight. That the complainant is not so restricted is self-evident.

The plaintiff is trying in this very cause, in the same form of action, and based upon the same stat-

ute, the identical issues which he tried in the New Jersey Court. If the claim by accretions is available here why was it not available in the New Jersey suit? And if it is not available under the New Jersey statute how does it become available here?

In the trial Court the plaintiff in his brief advanced the following argument:

"As we have already seen the complainant, in a bill under the statute to quiet titles, whose possession of the *locus in quo* is not questioned, is not compelled either to allege or prove the source of his title, or, indeed, that he has any title until and unless the defendant shows some interest or title in the lands. *Thereupon complainant is required to show that the said interest or title is not a valid interest or title to the lands. This he may do by showing an inherent defect in the claim or title asserted, or by showing that he has a superior title thereto.* Hence if, as in the New Jersey case and here, that possession is undisputed, the burden is at once cast upon the defendant to open and maintain his case affirmatively, and to establish the validity of his claim or title to the property in the complainant's possession."

This is a correct statement of the law, but is absolutely in conflict with the position taken by the plaintiff, both in the oral argument in this court and in the brief submitted in the court below, to wit, that "under the statute there is no opportunity for complainant to alter or vary the issue, to wit, the title claimed by the defendant."

An attempt is made to give this case a different aspect by asserting "an independent claim under the general jurisdiction of the Court to have the

cloud arising from the riparian grant removed," based upon general equitable principles of *quia timet*." This is equally untenable.

The only difference between the bill to quiet title under the statute and that under the general equity powers of the Court, is that in the former a jurisdictional element required to be proved by the complainant is that of peaceable possession. If this is not proved the complainant fails. In the cases under the general equity powers it is not necessary for the complainant to prove possession, but since possession in the case *sub judice* was admitted the two classes of action become identical. The fact of possession under the statutory procedure merely enables the complainant to maintain his action. In other words, the complainant under the general equity powers may say, "Even though I do not prove possession I may maintain my action." But as there was no question of possession in this case the action is maintainable, and being maintainable no greater relief could be had under the general equity powers than under the statutory proceedings.

The alleged "cloud upon the title" was the State's riparian grant, which was directly in issue in the New Jersey suit as well as in this suit. The plaintiff gains no additional rights by merely designating the adverse claim as a "cloud upon the title," for the reason that under the statutory action the defendant is required to set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, the defendant makes or claims, and to what part or what interest; and further how and by what instrument such title is claimed or derived or was created; and the prayer is "that by the determination and final decree of this Court the rights of all the parties to this suit in and to the lands

hereinbefore set forth, and every part thereof, may be fixed and settled, and that your orators may be decreed to have a perfect title thereto, and the defendants to have no interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void."

Certainly the "cloud on the title" is embraced within the intendment of the statute and the broad prayer for relief in the bill of complaint.

Vice-Chancellor Walker in his opinion in *Dewey Land Co. vs. Stevens*, Exhibit D1, page 110, lines 19 and 20, find that "The jurisdictional facts of peaceable possession in the complainant and no suit pending, are present." These were precisely the same jurisdictional facts that are found by Judge Haight in his opinion, at page 330, lines 32 and 33.

Judge Haight in his opinion, in order to sustain the theory that the dismissal of the bill of complaint in the New Jersey Court was equivalent only to a non-suit, cites the cases of *Steelman vs. Blackman*, 72 N. J. Eq. 330, and *Oberon Land Co. vs. Dunn*, 60 N. J. Eq. 280, where the complainant's bill in each case was dismissed for failure to establish the jurisdictional facts.

In *Steelman vs. Blackman*, the jurisdictional facts were lacking, and in *Oberon Land Co. vs. Dunn*, the Court lost jurisdiction by the act of the parties themselves, the parties having parted with all interest pending the litigation. These cases have no applicability to a case where the jurisdictional facts were established. Neither of the cases cited in Judge Haight's opinion attempted to deal with the merits of the respective title or claims of the complainant and defendant as was done in the case of *Dewey Land Co. vs. Stevens*.

Some capital is attempted to be made out of the refusal of Vice-Chancellor Backes in an opinion re-

ported in 85 N. J. Eq. 374, 96 Atl. Rep. 362, to amend the decree of the Court of Chancery by making the same more specific. This motion was denied, not on the merits of the application, but because the Vice-Chancellor conceived that the Court of Chancery was without power to amend a decree after the same had been affirmed by the Court of Errors and Appeals. He says in his opinion:

"The motion, in effect, is to amend the decree of the Court of Appeals. Upon a simple affirmance on the merits, there is nothing further for the lower court to do in the case but to enter the mandate and enforce the judgment."

A judgment if rendered upon the merits constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy concluding the parties and those in privity with them, *not only as to every matter that was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.*

The above doctrine is supported by *Cromwell vs. The County of Sac*, 94 U. S. 351; *Paterson vs. Baker*, 51 N. J. Eq. 49; *Clark Thread Co. vs. Wm. Clark Co.*, 55 N. J. Eq. 658.

The plaintiff attempts to show from the cases above cited that this rule applies only in situations where the cause of action is the same, and that the cause of action in the case *sub judice* differs from the cause of action in the New Jersey suit, hence that the rule is not applicable. It is elementary that if in the first suit no opportunity was available to present under the form of action a cause of action or defense, that the parties cannot be concluded by the earlier adjudication, because the effect of such

a holding would be to deny such party any opportunity to be heard. If no opportunity existed in the first suit, and a defense was not available in the second, it is evident that the party never could be heard upon the merits. The answer is that the matter was not previously adjudicated; that there was no opportunity to adjudicate it, and that hence the matter could not be *res judicata*.

In *Cromwell vs. The County of Sac*, it was held that there had been no previous opportunity to raise the question mooted in the second action, to wit, that the plaintiff therein was a *bona fide* holder for value of certain municipal bonds. In the case *sub judice* the plaintiff not only had the opportunity to base his claim upon accretions, but actually did so, and voluntarily abandoned such claim.

The case of *Paterson vs. Baker*, 51 N. J. Eq. 49, supports the appellant Stevens' contention. In that case the plaintiff had issued 200 coupon bonds, certain of which had gone into the possession of John Petrie. Two of these were stolen from Petrie, and subsequently after public notice of the theft had been given, the complainant, after receiving a bond of indemnity paid Petrie the full value of the bonds. The stolen bonds came later into the possession of Baker, the defendant, who presented them for payment, and upon payment being refused brought suit against the complainant to recover the amount due on the coupons attached to the bonds. The defense that Baker was not the *bona fide* holder was upheld. Baker died leaving a will which made his wife executrix. The city then brought suit in Chancery against the widow to have the bonds surrendered for cancellation, and it was held, upon the latter's attempt to show that she was a *bona fide* holder of the same; that this question had been finally determined and was *res judicata*.

Clark Thread Co. vs. Wm. Clark Co., 55 N. J. Eq. 658. The opinion in that case reveals the fact that the complainant had previously brought suit in the United States District Court for an injunction against the use of a trade-mark and for accounting for profits realized by its use. The suit instead of being directed against the company using the trade-mark had been brought against the latter's manager who served the company on a salary. The Federal Court allowed an injunction but refused to consider the prayer for an accounting because no profits could be shown against the defendant. The second suit reported under the above title was against the company itself and prayed for an accounting. The Court held that though there was an identity of parties in the two suits (treating the principal and agent as one), the rule of *res judicata* would not apply in view of the fact that under the first suit it had been impossible to show profits.

"It is entirely clear from the record in the preceding case and the testimony in this, that this was the reason why the decree in the former case was silent upon the question of accounting. It appeared in the evidence of the preceding case, without contradiction, and was stated in the brief of counsel for the defendant in that case, that Armitage was an employe of the William Clark Company upon a stated salary, beyond which he received nothing. All the profits received from sales made through his agency went to the present defendant. If the agent received no profits, it did not follow that the principal received none. Therefore, the decree in the first case, based upon the fact that the agent had received no profits, could not conclude the complainant from an accounting

against the principal for profits which it had received. The two decrees can stand together."

55 N. J. Eq. 667.

To summarize the reasons why the New Jersey suit was *res judicata* and the decree therein a bar to this action, we submit the following:

1. That the suits are identical in character, parties and privies, and in the prayers for relief.
2. That every title, right or claim asserted by the plaintiff in this suit were equally available to him in the New Jersey suit.
3. That the New Jersey suit was determined upon the merits and the opposing claims of the plaintiff and defendant were considered and there adjudicated, and the defendant Stevens' title was adjudged to be superior to that of the plaintiff Nirdlinger.
4. That the plaintiff Nirdlinger was bound in the New Jersey suit, not only as to any matter which was offered and received to sustain his claim or to defeat the claim or demand of Stevens, but as to any other admissible matter which might have been offered for that purpose. That among such admissible matters was the claim for accretions which was actually advanced in the original bill of complaint and later voluntarily abandoned by the complainant therein.
5. That the dismissal of the plaintiffs' bill in the New Jersey suit was not the equivalent of a non-suit, but was a dismissal after a hearing upon the merits, and that such dismissal constituted an adjudica-

plained of the loss of his vested right of adjacency. The Court of Errors, after full consideration, deliberately overruled the effect of the earlier decisions, and held that there was no right of adjacency in this state, and that the title of the state to its subaqueous lands was absolute and proprietary in character.

Since then *Stevens vs. The Railroad* has been continually cited as upholding the absolute character of the state's title. Among many cases we may cite the following:

Hoboken vs. Penn. Railroad, 124 U. S. 656;
Hoboken vs. Hoboken Land & Imp. Co., 36 N. J. L. 540;

American Dock & Imp. Co. vs. Trustees of Public Schools, 39 N. J. Eq. 409;

Marcus Sayre vs. Newark, 60 N. J. Eq. 368;

Simpson vs. Morehead, 65 N. J. Eq. 629;

Phil. Brewing Co. vs. McOwen, 76 N. J. L. 636;

Sooy Oyster Co. vs. Gaskill, 71 N. J. Eq. 308;

Attorney-General vs. Lehigh Valley R. R. Co., 78 N. J. Eq. 349.

The doctrine of *Stevens vs. The Railroad* has never been limited or modified unless it is considered that the existence of the *jus publicum* is a limitation. While navigable lands remain under water they are subject, whoever the owner may be, to such public uses as navigation, fishing, bathing, etc.

The *Stevens* case was cited in both the majority and concurring opinions filed in *Dewey Land Co. vs. Stevens*. In the majority opinion it was referred to as establishing the defendant's *prima facie* case (despite the fact that the accretions had filled in

nearly all the space included within the State's grant). The fact that it is also cited by Judge White shows that it was before the Court in conference and its authority there understood and appreciated.

TITLE BY ACCRETIONS.

It must be borne in mind that both the original line of high water and the present high water line are convex in contour, and that the new high water line is more than double the length of the original line.

How shall this longer line be equitably divided between co-terminus owners claiming under a common grantor?

The first question to be settled is the time when the rights of the respective parties accrue. This has been settled in New Jersey as follows:

“As between vendor and vendee the right to alluvion depends upon the condition of the land at the time of the transfer of the legal title.”

Ocean City Assn. vs. Shriver, 64 N. J. L. 550, 551.

The title was in the common grantor, to wit, the Atlantic Beach Front Improvement Company, until November 9, 1899, when it was granted to Burkhard, Stevens' predecessor in title. (Exhibit D1, Appeal Record, N. J. Ct. of E. & A., p. 92.)

The easterly ninety feet of plaintiff's lands were conveyed by the common grantor, the Atlantic Beach Front Improvement Company, to the States Avenue Land Company, by deed dated May 24, 1900.

The question, therefore, presented is: What would have been an equitable method of division between Burkhard and the Atlantic Beach Front Improvement Company of lands formed by accretions since November 9, 1899? Would the Atlantic Beach Front Improvement Company have been entitled to all of the gains, while Burkhard would be restricted not only to his original ocean frontage, but to a shorter line? Because obviously the effect of protracting Burkhard's side lines would be to effect such a reduction, since his original shore line ran at an oblique angle.

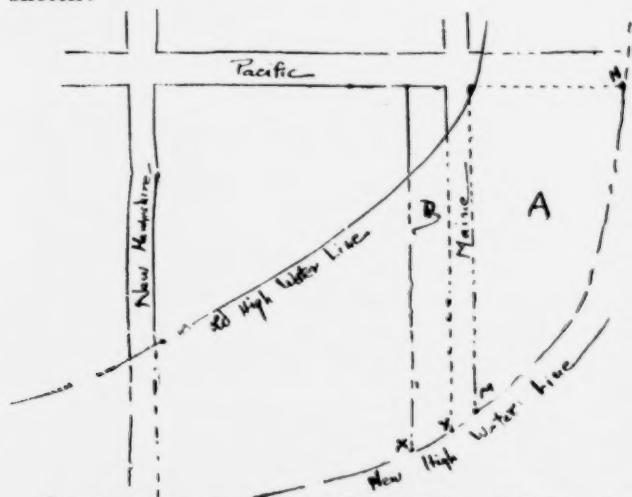
In order to sustain the decree in this case it must be held against all authority that under such circumstance one co-terminus owner is entitled to all of the gain caused by the longer shore line, and the other to no part of such gain. Is there any way of equitably dividing a segment except by radial lines? The attempt to do otherwise, it seems to us, is equivalent to an attempt to square a circle.

The difficulty with the opinion of Judge Haight is that he does not apply his method to the whole area of accretions, nor does he apply it to the rights of the parties as they accrued at the time of the conveyance from the common grantor, to wit, November 9, 1899. He conveniently moves his trouble further up the beach and leaves it there. He says:

“Whether the riparian proprietors who owned lands east of the plaintiff's lands should have the accretions divided among them on lines parallel with New Hampshire Avenue, or on lines parallel with Pacific and Oriental Avenues, it is not necessary to decide.”

But there is a necessity for such a decision if we are correct in our major premise that the real ques-

tion in controversy is: How should the longer high water mark be divided between Burkhard and the Atlantic Beach Front Improvement Company? The method suggested by Judge Haight ignores this factor and ignores a large part of the accreted territory lying to the east, and his method, if carried to its ultimate conclusion, would result in the owner holding the extreme easterly portion of the shore taking all of the gain by accretion within the boundaries of Pacific Avenue and Maine Avenue extended. Even though he owned but a foot of ground he would become the owner between lines diverging at an angle of ninety degrees of a great tract of accreted land. This point may be illustrated by the following rough sketch:



The tract marked A is the result obtained by adopting the side line extension scheme. B, the adjoining lot owner, acquires a smaller water frontage on the new high water line (X-Y) than he had on the

old; while A, owning only a foot of land, acquires the extensive frontage indicated (M-N). This is the result of side line extension—a mere legal lottery.

General Principles of Accretions.

Concerning the general principles of division Professor Farnham has the following to say:

“In *Deerfield vs. Arms*, 17 Pick. 41, the Court says two objects are to be kept in view in the division of a water front; one is that the parties shall have an equal share in proportion to their lands of the area of newly formed land, regarding it as land useful to the purpose of cultivation or otherwise in which the value will be in proportion to the quantity; the other is to secure to each an access to the water and an equal share of the river line in proportion to his share on the original line of water, regarding such water line in many situations as principally useful for forming landing places, docks, etc., with a view to benefits of navigation. *The main object to be kept in view in any division of accretions or the bed of water is that the division shall be equitable, and that it shall be proportionable so far as to give each shore owner a share of the land to be divided and his due portion of the exterior water line.*”

3 *Farnham on Waters*, p. 2474.

“The title by accretions or right of accession in relation to land is a sort of legislative donation of what would without such donation be public property * * *. This legal title refers, it is true, to one of the lines of the riparian pro-

prietor's original title as a measure of his right of accession in the alluvial accretions of soil. But the line so referred to is not the side lines of the original conveyance or grant. It is its front line, and the front line alone. The course of side lines is of no consequence in the division of alluvion formed subsequently to the conveyance or grant. The line of such division must be drawn in such a manner as that each of the contiguous riparian proprietors *shall have such a proportion of alluvial soil as the total extent of his front line bears to the total quantity of the alluvial soil to be divided.*"

Delord vs. New Orleans, 11 La. Ann. 699.
(The italics are our own.)

The principle universally recognized by Courts that are called upon to establish rules for division of riparian lands, is that the upland owners are entitled to take new front in proportion to their ownership of the old frontage. In those cases where right angles were drawn to determine a division it will be found that the shore was straight, and that a proportionate division of the new shore line was thereby effected. Where the shore does not form a straight line, but is convex or concave, and the protraction of the side lines being impracticable, the new water front is divided proportionately.

Wonson vs. Wonson, 14 Allen, 71;
Batchelder vs. Keniston, 51 N. H. 496;
Kehr vs. Snyder, 114 Ill. 313;
Deerfield vs. Arms, 17 Pick. 45;
Johnston vs. Jones, 66 U. S. 1;
O'Donnell vs. Kelsey, 10 N. Y. 412;
Nauman vs. Burch, 91 Ill. App. 48;
Berry vs. Hoogendoorn, 133 Iowa, 437, 108 N. W. 923;

- Newell vs. Leathers*, 50 La. Ann. 162, 23 So. 243;
Hathaway vs. Milwaukee, 132 Wis. 249, 9 L. R. A. (N. S.) 778; 111 N. W. 570, 112 N. W. 455;
Groner vs. Foster, 94 Va. 650, 27 S. E. 493;
Stock vs. Neriwhether, 57 Pac. 438 (Kan. S. C. 1916);
Reed vs. Moore, 151 S. W. 1005 (S. C. Ark. 1912);
Malone vs. Moves, 145 S. W. 193 (S. C. Ark. 1912).

With regard to lakes, the same principle controls. *Calkines vs. Hart* (N. Y. Ct. of App. 1916), 113 N. E. 785; *L. R. A.* 1917 B. 783, and the cases set forth in the foot note to the *L. R. A.* reference noted above.

The cases on the subject have been collected and are set forth in two comprehensive editorial notes found in 21 *L. R. A.* 776, and 25 *L. R. A.* (N. S.) 257.

Judge White, in his opinion in *Dewey Land Co. vs. Stevens*, adopts the apportionment made by the riparian commission, which covers the entire frontage of lands formerly owned by the common grantor, as equitable. Indeed, it requires but a single glance at the map (Exhibit D8) to satisfy one of the correctness of this view. It is inevitable from the contour of the shore line that the line of the riparian grants and the lines of accretions should be coincident. Judge White says in his opinion:

"Of course, changes are constantly taking place in the high water lines and in the direction thereof. A shore which one year was concave in its contour may a year later have become convex. The resultant effect upon lines projected at right angles to it at various points during the

process of transition to determine boundaries between neighboring accretion gains, is hopelessly confusing and the consequent state of uncertainty in titles most injurious. A practical working system is necessary for the good of all, *and where such a system has been established its fairness must be more than questioned, in fact, must be clearly overthrown, before the courts will feel justified in intervening. Such a working system seems to have been adopted by the riparian commission under its appointment by, and within the discretion vested in it by the sovereign power of the state.* Under this working system it takes the line of general contour of the shore in the vicinity, and, disregarding local or trivial or temporary indentations or excrescences, runs its division lines at right angles, or as nearly at right angles as is equitable under the circumstances, to such general line of contour at the time it takes up the subject of making riparian grants in such vicinity, and then, subsequently adheres as nearly as possible, or as is equitable, to the general division lines thus established, without regard to the fact that subsequent shifting of angles and locations of the high water line may have brought about a condition which, if it had existed originally, would have produced different results in the directions of such division lines. *Not only do I fail to see any unfairness in this working system, but, on the contrary, I cannot see how any other could be practical.* Where, therefore, as here, the riparian commission has made a grant, the bounding division or side lines of which run at right angles, if that is equitable, or if not, at such angle as,

under the circumstances, is equitable, to the general contour of the shore at the time of the plotting or surveying of the vicinity for riparian granting, such lines will, I think, be upheld by the courts as a *practical and legal ascertainment* of the boundary lines of subsequent accretion gains to the adjacent high land should such gains occur. *Gould Wat. Secs.* 162, 163. This is so, I take it, not because the state, through the riparian grant, has vested in its grantee a title to land under water which survives when the land by accretions to the adjacent high land has ceased to be under water, but because the riparian grant, as here made, is by its very authority confined to the land under water in front of the grantees adjacent high land, viz., to the land which would become his by accretion to such high land should natural accretions occur, and, consequently, the division boundary lines defined in the grant are an authoritative ascertainment by the granting tribunal of the boundary lines of these accretion gains should they occur. *Gould Wat. Sec.* 162."

Dewey Land Co. vs. Stevens, 83 N. J. Eq. 656.

Plaintiff in the argument below cited a number of Massachusetts cases in support of his contention that where the owner had previously laid out property with reference to the lines of a street it was a sufficient reason for extending the lines of the lots on either side of the street parallel thereto, and most of these cases are cited by Judge Haight in his opinion. Among them are the following:

Valentine vs. Piper, 22 Pick. 88;

Piper vs. Richardson, 9 Metc. 155;

Drake vs. Curtis, 9 Cush. 446;
Commonwealth vs. City of Roxbury, 9 Grey
 523;
Gerish vs. Gary, 120 Mass. 132;
Adams vs. Wharf Co., 76 Mass. 521;
Attorney-General vs. Boston Wharf Co., 78
 Mass. 553.

Counsel for the plaintiff have misconceived the force and effect of the Massachusetts decisions which they cite. These cases *do not* hold that the side lines of upland lots and of streets will be extended to the extreme line of riparian ownership. On the contrary they uphold the negative of this proposition. They do hold that where co-terminus shore owners agree on the division of their subaqueous lands the courts will uphold their agreement, and further that where these lands have been built on and the artificial boundaries acquiesced in for long periods of time, an agreement of division will be implied therefrom. Beyond this they do not go.

By an ordinance passed in 1641, littoral proprietors were entitled to hold to the low water mark. The foreshore, known in Massachusetts as flats, has ever since been regarded as vested in the upland owners, although flooded by the tides. The problem of drawing the division lines between owners of these flats would have been conveniently settled by protracting the side lines of upland ownership. But the courts early refused to apply this rule of convenience, declaring it inequitable, and substituted the rule of division by right angles where the shore was straight, and proportionate division on the line of low water where the shore was curved.

Thus it was held in *Rust vs. Boston Mills Corp.*, 6 Pick. 169, that the direction of the side lines of the

upland would not govern that of the side lines of the flats, but that the *locus in quo* being situate on a cove, the division must be proportionate. This view was affirmed and followed in *Piper vs. Richardson*, 9 Met. 155, 158,—the Court declaring “the side lines of the upland have no influence in deciding the direction of the exterior side lines of the flats,” in *Drake vs. Curtis*, 9 Cush. 446; *Curtis vs. Francis*, 9 Cush. 447; *Stone vs. Boston Steel & Iron Co.*, 14 Allen 130, and many others.

The intention of the ordinance was “if practicable, to give to every proprietor the flats in front of his upland of equal width with his lot at low water mark.” Wilde, J., in *Gray vs. Deluce*, 5 Cush. 12. Therefore, where there was no cove or headland, a straight line is to be drawn according to the general course of the shore at high water and the side lines of the lots extended at right angles with the shore line. *Sparhawk vs. Bullard*, 1 Mete. 106; *Porter vs. Sullivan*, 7 Gray 443; *Deerfield vs. Allen*, 17 Pick. 45, 46; *Knight vs. Wilder*, 2 Cush. 210.

Around the headline, it was held, lines dividing the flats must diverge towards low water mark. *Gray vs. Deluce*, 5 Cush. 12, 13; *Porter vs. Sullivan*, *supra*.

The plaintiff has placed considerable emphasis on *Valentine vs. Piper*, 22 Pick. 85. An examination of that case shows that the dispute was not over flats but over uplands, the Court holding that proof of the ownership of the upland carried with it a presumption of ownership of the flats. Regarding the side lines of the flats, the Court held that where those lines had been established by awards or fixed by agreement of the parties, these boundaries would be recognized by the Court. In this case the northerly side line had become established by the erection of a wharf extending into the water. To this

wharf Summer Street had later been run. The wharf had finally fallen to pieces, but its location remained fixed by the line of the street. The Court held that the southerly line of the flats should conform to the established boundary on the north, referring to the street. Counsel have deduced therefrom that the Court regarded Summer Street as in itself determining the boundary. This was not the case, the line of Summer Street being used to fix the riparian division lines solely because it marked the line to the old wharf, which extending to low water mark had served to mark the division of ownership of the flats.

Judge Haight does not attempt to enunciate any rule for the equitable division of the accreted territory, but bases his decision upon a presumed agreement of the parties or their predecessors in the title, and makes this the decisive factor. This view Judge Haight attempts to support by the following facts:

A. New Hampshire Avenue is delineated on the "1854" map as extending in a straight line and at right angles to Pacific Avenue to the low water mark of the Atlantic Ocean, further than it extends at the present time.

B. Numerous conveyances have been made and mortgages executed upon the properties where the properties have been described by lines running at right angles to and parallel with the street system.

From A and B he finds that "It is manifest that if it should be held that the respective riparian proprietors are entitled to accretions in accordance * * * with the lines of their riparian grants * * * a very great confusion in titles would result and the

door be thrown open, in the straightening out of lines, to the making of exorbitant demands, etc.”

Before considering the reasoning of Judge Haight particular attention should be called to the following facts: That as to all lands lying eastward of New Hampshire Avenue and owned by the plaintiff's predecessor in the title, except for a strip of 90 feet east of and parallel with New Hampshire Avenue, riparian grants along radial lines were made by the State of New Jersey, the first of which was dated December 29, 1900, and made to John McPherson, and two of which were made on October 21, 1901, to Charles G. Henderson, et als. (See Map Exhibit D8.)

It will be recalled that the title of the plaintiff as to a strip 100 feet in width and beginning 90 feet east of New Hampshire Avenue came from the Atlantic Beach Front Improvement Company, who conveyed to Henderson, Moss and Hancock by deed dated November 1, 1899. (Appeal Record, p. 75.) Henderson, et als., conveyed to Conrow by deed dated April 14, 1903. (Appeal Record, p. 76.) Conrow conveyed to the States Avenue Land Company by deed dated April 14, 1903. (Appeal Record, p. 76.) States Avenue Land Company conveyed to Dewey Land Co. by deed dated December 9, 1904. (Appeal Record, p. 77.) It will, therefore, be seen that the plaintiff's predecessors in the title, to wit, Henderson and others, not only acquiesced in the method of radial lines of the riparian grants, but actually received conveyances thereof from the State of New Jersey prior to conveying their title to the plaintiff.

Not only did the plaintiff's predecessors in the title recognize and accept radial boundary lines for the riparian grants, but the plaintiff himself spe-

cifically recognized the principle of radial lines as applied to accretions by the following formal deeds:

Deed, Dewey Land Company to Louis E. Stern, dated July 17, 1912, the description of which reads as follows:

“Beginning at the intersection of the south line of Dewey Place with the east line of New Hampshire Avenue, and extending thence east along the south line of Dewey Place 190 feet; thence southward parallel with New Hampshire Avenue 350 feet, more or less, to high water line of Atlantic Ocean as it existed on April 14, 1903; *thence east at right angles to high water line of the Atlantic Ocean as it existed in 1856, 770 feet, more or less, to said high water line as it then existed*; thence southwest along the high water line of the Atlantic Ocean as it existed in 1856 to point in said high water line where the same would be intersected by the east line of New Hampshire Avenue extended; thence north in the east line of New Hampshire Avenue, extended, 1120 feet, more or less, to beginning.” (Appeal Record, p. 67.)

Louis E. Stern conveyed to Samuel F. Nirdlinger, dated July 17, 1912, the property last above referred to by a description identical with that contained in the deed from the Dewey Land Company to himself.

It is at once apparent that the deed from Stern to Nirdlinger, last above referred to, included lands formed by accretion between 1903 and the date of the deed (see Exhibit D8), and that thereby there was a clear recognition by Nirdlinger of the principle of dividing the accreted territory by lines formed at right angles to the shore line. It is true

that he adopted the shore line of 1856 as the base of his right angle. While this line cannot be accurately defined at the present time, every known high water line, as well as the low water line of 1852, was convex in contour.

We then have the plaintiff himself by a formal deed made directly to himself recognizing the principle of radial lines of division as to a part of the *locus in quo*. We also have his predecessors in the title, namely, Henderson, Moss and Hancock, accepting riparian grants with radial lines of division, from the State of New Jersey affecting another part of the *locus in quo*.

THE PRESUMED AGREEMENT OF THE PARTIES THAT
NEW HAMPSHIRE AVENUE SHOULD CONSTITUTE A
BOUNDARY LINE OF ACCRETIONS WHEN THEY
SHOULD FORM.

With whom was such an agreement made? Down to 1899 the lands on both sides of New Hampshire Avenue were in common ownership so far as the beach front was concerned. There was no one with whom any agreement could have been made. It was impossible for the holder of the common title to "agree" with himself. Cases cited both in the opinion of Judge Haight and in the brief of counsel refer to agreements between co-terminus owners, and relate to lands below the high water mark. Clearly the adoption of the boundary line above the high water mark would be no evidence of an agreement as to the division of lands below the high water mark, or of accretions should they occur. There was clearly, therefore, no agreement prior to 1899 as to the division of accretions, because there was no one with whom such an agreement could be made.

The record in this case discloses every conveyance made to the high water mark and covering all of the lands acquired by John McClees. As none of the several hundred grantees who accepted deeds running at right angles to or parallel with the street system were riparian owners it makes no difference whatever to their titles how the shore line originally ran, or how the division lines of accretions formed subsequently to their acquisition of title shall go. McClees could convey lands which he owned inside of the high water mark by any angles that he saw fit. It was his land until 1899 and extended to the high water line wherever it might be. The only conveyances made subsequent to that time are accounted for in this proceeding. How it is "manifest * * * that a very great confusion in titles would result" to several hundred other grantees is not apparent. Their title papers were not before the Court; no one of these parties was before the Court, and it does not appear by any proof that their titles would be in any way adversely affected. As the land was in a common grantor until 1899, and their conveyances must have been made prior to that time, they received their titles from the only man who had any claim thereto, viz., John McClees, regardless of how future accretions should be divided. Accretions had formed when they took their deeds, and there could be no adverse claimant because of the fact that McClees owned all of the land to the high water mark.

By way of illustration let us assume that McClees continued to own all of the lands appearing upon Exhibit D8 up to the high water mark of 1907, and that he conveyed them to sundry grantees, reserving to himself a belt of 15 feet of ocean front. There would be nothing whatever to prevent his making conveyances within the lands thus indicated at right

angles to or parallel with the street system, nor would the rights of such grantees be in any way affected if subsequently to 1907 accretions formed out to and corresponding with the riparian commissioners' exterior line as shown upon Exhibit D8. Obviously all of such newly accreted lands would belong to McClees, and obviously all of the lands theretofore granted by him parallel with or at right angles to the street system would be the property of his grantees, and no confusion to the title of his grantees would result from the last formed accretions.

It seems passing strange that if the confusion in their titles (not before the Court) was so "manifest" that it would not have been apparent to Judge White who, as is well known, lives at Atlantic City, and who endorsed the plotting of the vicinity for riparian grants as a practical and legal ascertainment of the boundary lines of subsequent accretion gains to the adjacent high lands, should such gains occur. It is scarcely conceivable that Judge White, a resident of Atlantic City, and the owner of valuable property interests along the beach front, should have been so insensible to the danger as to promulgate a rule, the effect of which would be to throw into confusion hundreds of titles almost at his very door.

ON THE RIGHT TO CROSS THE LINE OF NEW HAMPSHIRE AVENUE:

It must be remembered that in New Jersey abutting property owners own the fee to the center of the street. *Ocean City vs. Shriver*, 64 N. J. L. 554; *Salter vs. Jonas*, 39 N. J. L. 469. This fee is sub-

ject to the easement of the public, but the fee is in the abutting owners.

It was absolutely essential that the line of accretions for lands formerly owned by McClees should cross the streets as laid out in the Atlantic City street system. At one time the high water mark was practically at the corner of Vermont and Pacific Avenues. (See Judge Haight's opinion, p. 331, lines 30-34.) Since that time lands have formed at least 1000 feet south of Pacific Avenue, at least 800 feet east of Vermont, which made necessary the crossing of the following avenues: Pacific, Vermont, New Hampshire, and Maine Avenues.

Upon what principle of either law or logic can it be said that the owner of the lands at the high water mark at the time when it intersected Vermont and Pacific Avenues would be barred from accretions crossing the street system? To whom would such accretions belong? If to the owner of the shore line then it would be absolutely necessary that his rights should extend across the street system. How would the public be injured? The public easement in the street would continue regardless of the abutting property owner's ownership of the fee. Since the public would not be injured, and since there could be no rival claimants where the shore line was in common ownership, to deny the riparian owner the right of crossing the street system would be a palpable absurdity. If the streets were originally dedicated to the high water mark the dedication would continue, and would carry the dedicated street to the new high water mark formed by accretions.

Judge Haight relied upon the case of *Stockton vs. Browning*, 18 N. J. Eq. 309, which he considered so nearly analogous as to make the case an important authority. *Stockton vs. Browning* was a case where

an old division line between lands lying on tide-water had for more than forty years been treated by the owners as extending over the shore or the lands between high and low water, and regarded the same as the division line of their right upon the shore. In that case it was held that the recognition of this line *below* the high water line fixed the rights of the parties. It is not authority, however, for the proposition that the recognition of the line above the high water mark, to wit, New Hampshire Avenue (in this case) fixes the line for the division of accretions.

In the *Browning* case the division line was created by deed of 1695. By conveyance made in 1769 the division line was fixed and was recited to extend to *low water mark*. A similar deed in 1843 conveyed the lands to *low water mark*. It was originally supposed in New Jersey that the title of the riparian owner extended to low water mark. As there had been this recognition of a line of division for a long period the Court held that the parties were bound by the recognized line when accretions occurred.

In the *Browning* case, however, there were two elements not present in the case *sub judice*: (1) That the agreement as to the division line related to lands below the high water mark. (2) There were adjoining owners (so that an agreement could be made). In the case *sub judice* New Hampshire Avenue is above the high water line and the easement of New Hampshire Avenue was not intended as a line of division between separate owners but the lands on both sides of the street were in common ownership. Will the Court upon such a slender foundation assume and create an agreement that the mere laying out of this public street through lands in common ownership at the time was acquiesced in

by the common owner as the means of unnecessarily depriving him of his right of accretions when they should occur? Can it go further than to say that the laying out of the public streets was an acquiescence by the owner of the common title in the public easement or use of such street? Certainly the public rights demanded nothing more than this, and to exact more of the owner would be to deprive him of his natural rights without benefit to any one else in such a situation. *If such owner was not entitled to the accretions there appears to be no one else in being who could lawfully claim the same.*

A number of cases have been cited by the plaintiff in support of the proposition that the defendant has no right to cross the line of New Hampshire Avenue. Among them is the case of *Banks vs. Ogden*, 2 Wall. 57. An examination of these cases discloses the fact that the streets referred to were streets intervening and bordering the high water mark, and not streets running at right angles thereto, as does New Hampshire Avenue. When properly considered they simply hold the well-known doctrine that if there be any intervening lands between that of the claimant and the high water mark, the claimant can take nothing because he is not a riparian owner. Extended comment or discussion is unnecessary.

Appellant's reasons for the reversal of the decree of the District Court may be summarized as follows:

(a) Because this matter is *res judicata* by the New Jersey suit. The reasons in support of the above are summarized at pages 19 and 20 of this brief under the title of "*Res Judicata*."

(b) The appellant's riparian grant conveys an absolute title. In support thereof, See *Dewey Land Co. vs. Stevens*, 83 N. J. Eq. 314 and 656; *Stevens vs. The Paterson Railroad*, 34 N. J. L. 532, and other cases cited under the caption of "On the Effect of the Riparian Grant." (Pages 21 and 22.)

(c) The appellant is entitled to the *locus in quo* by reason of accretions. In support thereof the following propositions are advanced:

1. The basis of division is the respective rights of Burkhard (appellant's predecessor in title) as of November, 1899, and the Atlantic Beach Front Improvement Company.

2. The method of division should be such that the contiguous riparian proprietors, viz., Burkhard and the Atlantic Beach Front Improvement Company, shall have such a proportion of the alluvial soil as the total extent of their respective front lines bear to the total quantity of the alluvial soil to be divided, and such line of division is referable not to the side lines of the original conveyance but to the front line alone.

3. Because the mere protraction of the side lines would result in an inequitable apportionment, in that all of the gain in the shore line would go to the most easterly proprietor instead of being equitably divided.

4. Because the assumed agreement that New Hampshire Avenue should constitute a boundary line between co-terminus owners has no basis in fact, the lands on both sides of the street being in com-

mon ownership up to the time of the conveyance to Burkhard, and there being no co-terminus owners between whom an agreement could be made.

5. Because all of the lands east of *Vermont Avenue* south of *Pacific Avenue* have been formed by accretions and have crossed several streets, and an attempt to limit the riparian owner so that he could not cross the line of any public street would be to exclude from ownership by accretion all lands lying south of *Pacific Avenue* and east of *Vermont Avenue*, and such a ruling would unquestionably unsettle hundreds of titles.

6. Because plaintiff and plaintiff's predecessors in the title acquiesced in the division of a part of the *locus in quo* along radial lines, both as to riparian grants and accretions. See riparian grant, State of New Jersey to John McPherson, and State of New Jersey to Charles G. Henderson (Map, Exhibit D8; Brief, p. 34) and deed, Dewey Land Co. to Stern (Exhibit P24; Appeal Rec. p. 67) and Stern to Nirdlinger (Exhibit P26; Appeal Rec. p. 68).

In conclusion, it is respectfully submitted that the decree should be reversed for the reasons stated in this brief.

HARVEY F. CARR,
Attorney for and of Counsel
With Petitioner.

Office Supreme

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WM. R. S.

NO. ~~500~~ 200

IN THE

UNITED STATES SUPREME COURT

October Term, 1921.

HENRY E. STEVENS, Jr.,
Petitioner,

vs.

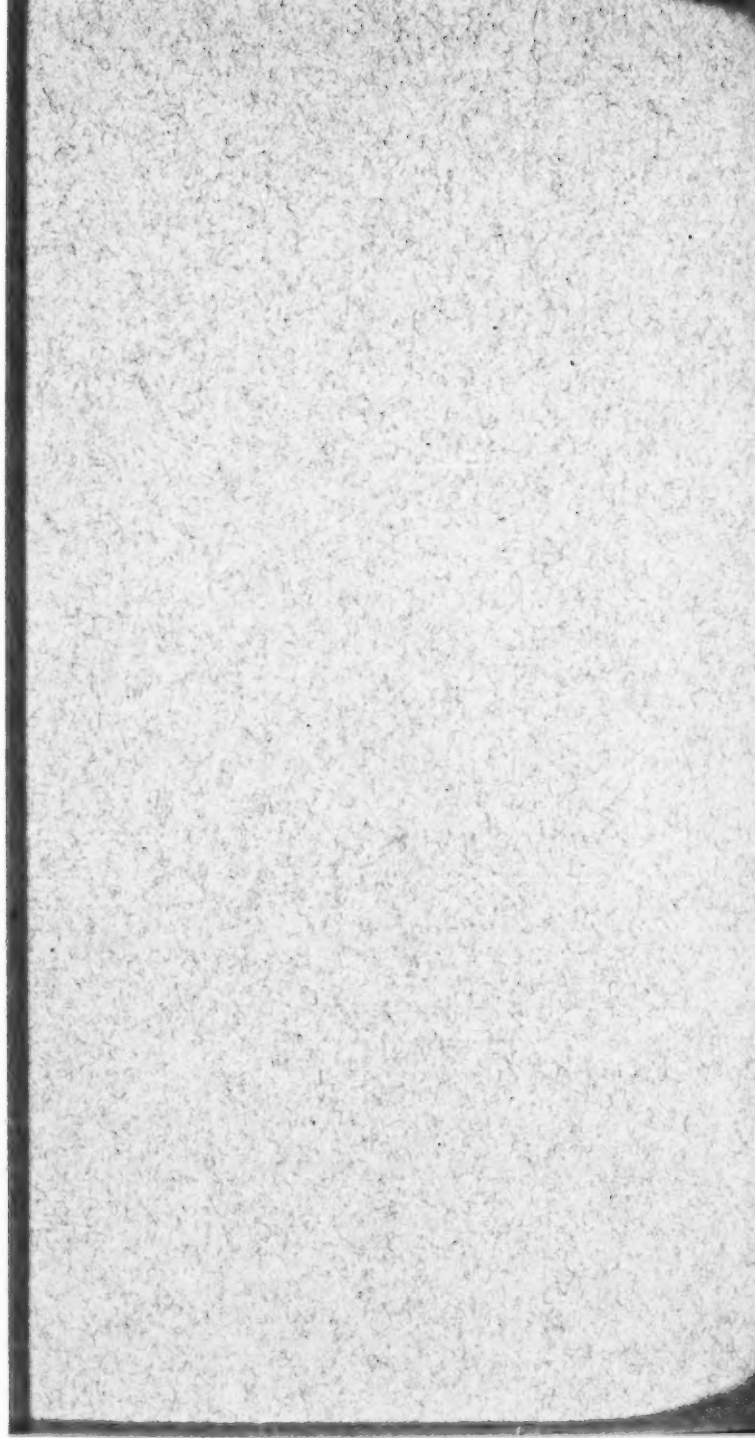
ARTHUR S. ARNOLD, ABRAM L. ERLANGER
and **REAL ESTATE TITLE INSURANCE**
AND TRUST COMPANY OF PHILADEL-
PHIA, Executors and Trustees under the Will
of **SAMUEL F. NIRDLINGER,** Deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI

to Review Decree of the Circuit Court of Appeals
Affirming Decree of the United States District
Court for the District of New Jersey
together with

MOTION AND NOTICE AND APPEARANCE.

HARVEY F. CARR,
Attorney for and of Counsel
with Henry E. Stevens, Jr.,
Petitioner.



Petition

SUPREME COURT OF THE UNITED STATES.

HENRY E. STEVENS, JR.,

Petitioner,

vs.

ARTHUR S. ARNOLD, ABRAM
L. ERLANGER and REAL
ESTATE TITLE INSURANCE
AND TRUST COMPANY OF
PHILADELPHIA, Executors
and Trustees under the
Will of SAMUEL F. NIRD-
LINGER, deceased,

Respondents.

Petition for Writ of
Certiorari to Review
Decree of the Cir-
cuit Court of Ap-
peals Affirming De-
cree of the United
States District Court
for the District of
of New Jersey.

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*To the Honorable the Supreme Court of the United
States:*

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The petition of Henry E. Stevens, Jr., respect-
fully shows to this Honorable Court that:

On the twenty-sixth day of October, nineteen hun-
dred and fourteen, Samuel F. Nirdlinger, a resident
and citizen of the City of Philadelphia and State of
Pennsylvania, filed his bill of complaint against
Henry E. Stevens, Jr., a resident and citizen of the
City, County and State of New York, in the United
States District Court for the District of New Jersey.
The bill was filed by the complainant to quiet title
to certain lands along the Atlantic Ocean at At-
lantic City, New Jersey, and was based primarily
on the New Jersey statute entitled, "An Act to com-

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pel the determination of claims to real estate in certain cases and to quiet title to the same." 4 N. J. C. S. 5399. The *locus in quo* borders on the high water mark of the Atlantic Ocean, and has been formed by accretions or alluvion, and has a value in excess of one hundred thousand dollars.

To this bill your petitioner filed an answer setting up the defense of *res judicata* as well as a claim under a riparian grant from the State of New Jersey, and also by accretions. The defense of *res judi-*
10 *cata* was based upon a bill filed in the New Jersey Court of Chancery on October second, nineteen hundred and nine, against the same defendant, and praying for the same relief in respect to the same property, which proceedings were set forth at length in the answer.

The original bill in the New Jersey Chancery proceedings claimed the *locus in quo* by reason of accretions "in front of said tract of land by alluvial
20 deposits." An amended bill was filed in the New Jersey Court of Chancery in which the claim based upon accretions was abandoned and a claim based upon deeds executed by former owners was substituted. At the final hearing in the New Jersey Court of Chancery this amendment was made, and the defendant in that suit (Stevens) applied for and was granted permission to answer the amended bill, and also to include in the defendant's claim of title based upon a riparian grant, a claim by accretions. In
30 the New Jersey Chancery suit the defendant there (Stevens) claimed under a riparian grant from the State of New Jersey as well as by accretions.

After a hearing on the merits in the New Jersey Court of Chancery an order was entered dismissing the bill of complaint, which order, so far as the same is relevant, reads as follows:

"And it appearing to the satisfaction of the Court that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill of complaint and set forth, and that said bill ought to be dismissed with costs:

"It is thereupon, etc., ordered that the complainants' bill of complaint be and the same is hereby dismissed with costs."

From this final order or decree an appeal was taken to the New Jersey Court of Errors and Appeals, which latter court after a hearing on the merits entered a decree of affirmance, and remitted the record to the Court of Chancery. Subsequently the bill in this case was filed, and in the answer the defense of *res judicata* was set up in bar of the action, as well as the defense on the merits based upon the riparian grant from the State of New Jersey, and the claim by accretions.

The prayer in the original bill filed in the New Jersey Court of Chancery, so far as it is here relevant, reads as follows:

"To the end, therefore, that the defendants may, in manner aforesaid, answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they or either of them make or claim, and to what part, or what interest; and further how, and by what instrument such title is claimed or derived or was created; and that by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and that your orators may be decreed to have a perfect title thereto, and the defen-

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dants to have no estate, interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void."

The prayer in the amended bill is identical with that of the original bill.

The prayer in the bill *sub judice* is identical in substance with the prayer of the other two bills, except that there is added thereto the following:

10 "And that the cloud upon the title of your orator to said lands and premises created and occasioned by the alleged riparian grant hereinabove referred to, and the deed of conveyance from William H. Bartlett and Elwood S. Bartlett and wife to the defendant hereinabove referred to may be, so far as said lands and premises are concerned, declared and decreed to be null and void, and of no effect as against your orator, and that your orator's right in and title to said lands and premises may be decreed to be relieved from the lien or cloud occasioned by the said alleged riparian grant and deed of conveyance, and that the said defendant, Henry E. Stevens, Jr., may be likewise decreed to have no title or interest in or to said lands and premises by reason of said alleged riparian grant and deed."

20 The additional matter at best is but surplus verbiage. Without the added matter the plaintiff prayed that he might be decreed to have a perfect title and the defendant to have no estate, interest in, or encumbrance upon the said lands, etc. No additional force is given to the prayer which asks that the defendant be decreed "to have no estate, interest in,

or encumbrance upon the said lands and premises by reason of said alleged riparian grant and deed." It is axiomatic that the greater includes the less.

Upon final hearing the United States District Court for the District of New Jersey entered its final decree on the twenty-fifth day of March, nineteen hundred and twenty, wherein it was adjudged that the final decree in the New Jersey Court of Chancery, affirmed by the Court of Errors and Appeals of the State of New Jersey, and the matters and things therein decided, "are not *res adjudicata* 10 of the issues herein contained, and constitute no bar to the plaintiffs prosecuting this suit."

It was further therein adjudged and decreed that the defendant Stevens "has no right, title or interest in or encumbrance upon the said lands and premises in dispute in this action," describing said lands by metes and bounds.

And it was therein further adjudged and decreed that "the cloud cast upon plaintiffs' lands by the riparian grant made by the State of New Jersey * * * 20 is decreed to be null and void and of no effect, and that the lands and premises hereinabove last described are hereby decreed to be relieved of and clear from the lien or cloud occasioned by said riparian grant and by the said deed from the State's grantees to William H. Bartlett and Elwood S. Bartlett, defendant's predecessors in title."

From the last mentioned decree an appeal was taken to the United States Circuit Court of Appeals for the Third Circuit, which said court on the second day of August, nineteen hundred and twenty-one, entered an order affirming said decree, and issued its mandate thereon to the United States District Court for the District of New Jersey on the second day of September, nineteen hundred and twenty-one. 30

A certified copy of the entire record of said case in said Circuit Court of Appeals is hereby furnished, attached to and made a part of this application, and marked Exhibit A, in compliance with Rule 37 of this Honorable Court.

10 Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in this case is erroneous, and that this Honorable Court should require said case to be certified to it for review and determination in conformity with the provision in Section 240, Judicial Code, said case being made final in said Circuit Court of Appeals by the provision in Section 128, Judicial Code.

The said case was decided in the said Circuit Court of Appeals and affirmed upon the opinion of the United States District Court for the District of New Jersey, and should be reversed for the following reasons:

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1. Because the suit in the New Jersey Court of Chancery was identical as to parties, property and the relief sought. Expressed in the language of Judge Haight in the United States District Court (Record, p. 318):

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“Sometime prior to the institution of this suit the present plaintiff and a corporation known as the Dewey Land Company, being at that time tenants in common of the land in question, brought a suit in the Court of Chancery of New Jersey under the *same* statute against the *same* defendant and therein sought the *same* relief in respect to substantially the *same* property as is sought in the present suit, except that the prayer for relief in the bill in the former suit did not, as does the bill in the present suit,

specifically pray for the removal of the alleged cloud upon the title."

The "alleged cloud" being the same claim under the riparian deed set up by the defendant in the New Jersey Chancery suit. This portion of the prayer relating to the "cloud on the title" appears above in this petition.

Under the New Jersey statute it is only incumbent upon the complainant in a suit to quiet title to set up the jurisdictional facts of peaceable possession, a hostile claim, and the fact that no suit is pending to enforce such claim. These facts being established the Court has jurisdiction to determine the controversy, and the defendant is required to assert, set forth and establish his title or claim. Upon the establishment of the jurisdictional grounds the position of the defendant in the suit is shifted so that he becomes in effect a plaintiff in an ejectment suit. *Fittichauer vs. Met. Fireproofing Co.*, 70 N. J. Eq. 429, 431. In other words, if the defendant makes no proofs the complainant succeeds by virtue of his possessory title. 10 20

A title by possession is better than no title, so that in order for a defendant to defeat the complainant in such a suit he must show and prove a title superior to the complainant's title by possession, hence any adjudication or determination of the Court that the complainant is not entitled to relief carries with it as a necessary corollary the fact that the defendant has asserted and proved a title superior to that exhibited and proved by the complainant in such a suit. 30

2. The doctrine of *res adjudicata* applies not only to the claim or demand in controversy, concluding

the parties and those in privity with them, as to any matter which was offered and received to sustain or defeat the claim or demand, but as well, to any other admissible matter which might have been offered for that purpose. See *Cromwell vs. County of Sac*, 94 U. S. 351.

10 It is obvious that in the Chancery suit not only was opportunity afforded to the complainant to base his claim upon accretions, but such claim was actually made by him and abandoned. He is, therefore, concluded in that suit as well as in this as to such claim.

To summarize the reasons why the New Jersey suit was *res adjudicata* and the decree therein a bar to this action, your petitioner submits the following:

- a. That the suits are identical in character, parties and privies, and in the prayers for relief.
- 20 b. That every title, right or claim asserted by the plaintiff in this suit were equally available to him in the New Jersey suit.
- c. That the New Jersey suit was determined upon the merits and the opposing claims of the plaintiff and defendant were considered and there adjudicated, and the defendant Stevens' title was adjudged to be superior to that of the plaintiff Nirdlinger.
- 30 d. That the plaintiff Nirdlinger was bound in the New Jersey suit not only as to any matter which was offered and received to sustain his claim, or to defeat the claim or demand of Stevens, but as to any other admissible matter which might have been offered for that purpose. That among such admissible matters was the claim for accretions, which was ac-

tually advanced in the original bill of complaint and later voluntarily abandoned by the complainant therein.

e. That the dismissal of the complainant's bill in the New Jersey suit was not the equivalent of a non-suit, but was a dismissal after a hearing upon the merits, and that such dismissal constituted an adjudication adverse to every claim the complainant made or might lawfully have made in that suit.

f. Even though the decree of the New Jersey Court of Chancery or the Court of Errors and Appeals might have been more specific in form, yet in substance it is an adjudication that the title asserted by the defendant Stevens therein was superior to the title of the complainant Nirdlinger, and is a sufficient compliance with the New Jersey statute. 10

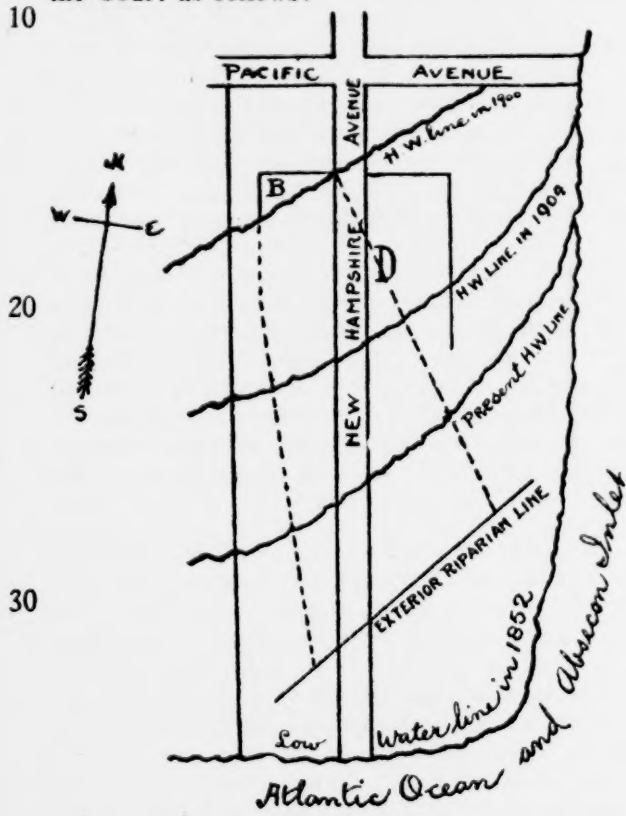
g. In any event neither the United States District Court nor the Circuit Court of Appeals is sitting in review of the decree of the New Jersey Court of Errors and Appeals. The function of the District Court and the Circuit Court of Appeals is limited to determining whether or not there was an adjudication on the merits. If so, such adjudication must stand and cannot be corrected or amended in this suit. 20

3. The riparian grant by the State was superior to the complainant's title by accretions. This is established by two opinions of the New Jersey Court of Errors and Appeals in *Dewey Land Co. vs. Stevens*, 83 N. J. Eq. 314, and 83 N. J. Eq. 656. Even if it should be held that the above case was not *res adjudicata*, certainly the rule of *stare decisis* would apply as representing the latest pronouncement of the court of last resort in New Jersey in construing the riparian grant in this very case, and even though 30

in conflict with the earlier cases must be regarded as the law of the State of New Jersey.

4. The Court erred in holding that the respondents' rights by accretion were superior to those of the appellant. The *locus in quo* is a triangular piece of land lying east of New Hampshire Avenue, which is shown by a sketch in the opinion of Judge White, which sketch is reproduced for the convenience of the Court as follows:

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All of the lands in question lie to the eastward of New Hampshire Avenue and New Hampshire Avenue extended to the riparian line established by the State of New Jersey, and have been formed by accretions. For a convenient summarized statement of the physical conditions your petitioner quotes from the opinion of Judge White, of the New Jersey Court of Errors and Appeals, in *Dewey Land Co. vs. Stevens*, 83 N. J. Eq. 656. It is to be observed that the shore line at this point and vicinity is convex, and that in order to completely divide all of the accreted territory such divisions must be by radial lines, and that the mere protraction of the side lines would result in an inequitable apportionment, in that all the gain in the shore line would go to the most easterly proprietor instead of being equitably divided. This method is pointed out by Judge White in *Dewey Land Co. vs. Stevens*, *supra*, as follows:

“But, however that might be, and returning to the question of whether there is involved in this case a conflict between the accretion rights of an owner of the shore and rights under a State riparian grant to an independent grantee of land in front of such shore, no one pretends that in the present case the riparian grant by the State to the defendants’ predecessor in title, Bartlett, was intended as or was a grant of any land under water not in front of and adjacent to the grantee’s high land at the time the grant was made. It was expressly made to depend upon his ownership of such high land. In other words, it was expressly confined in its limits to the area which in case of natural accretions would become a part of such high land by virtue of the law of accretions according to the loca-

tion of the high water line *as it existed at the time of the grant*. *Gould Wat. Sec.* 163; *Clark vs. Campau*, 19 Mich. 327; *Stone vs. Boston Steel and Iron Co.*, 96 Mass. 230. Of course, changes are constantly taking place in the high water lines and in the direction thereof. A shore which one year was concave in its contour may a year later have become convex. The resultant effect upon lines projected at right angles to it at various points during the process of transition to determine boundaries between neighboring accretion gains, is hopelessly confusing and the consequent state of uncertainty in titles most injurious. A practical working system is necessary for the good of all, and where such a system has been established its fairness must be more than questioned, in fact, must be clearly overthrown, before the courts will feel justified in intervening. Such a working system seems to have been adopted by the riparian commission under its appointment by, and within the discretion vested in it, by the sovereign power of the State. Under this working system it takes the line of general contour of the shore in the vicinity, and, disregarding local or trivial or temporary indentations or excrescences, runs its division lines at right angles, or as nearly at right angles as is equitable under the circumstances, to such general line of contour *at the time it takes up the subject of making riparian grants in such vicinity*, and, then subsequently, adheres as nearly as possible, or as is equitable, to the general division lines thus established, without regard to the fact that subsequent shifting of angles and locations of the high water line may have brought about

a condition, which, if it had existed originally, would have produced different results in the directions of such division lines. Not only do I fail to see any unfairness in this working system, but, on the contrary, I cannot see how any other could be practical. Where, therefore, as here, the riparian commission has made a grant, the bounding division or side lines of which run at right angles, if that is equitable, or if not, at such angle as, under the circumstances, is equitable, to the general contour of the shore at the time of the plotting or surveying of the vicinity for riparian granting, such lines will, I think, be upheld by the courts as a *practical and legal ascertainment* of the boundary lines of subsequent accretion gains to the adjacent high land should such gains occur. *Gould Wat. Secs. 162, 163.* This is so, I take it, not because the State, through the riparian grant, has vested in its grantee a title to land under water which survives when the land *by accretions to the adjacent high land* has ceased to be under water, but because the riparian grant, as here made, is by its very authority confined to the land under water in front of the grantee's adjacent high land, viz., to the land which would become his by accretion to such high land should natural accretions occur, and, consequently, the division boundary lines defined in the grant are an authoritative ascertainment by the granting tribunal of the boundary lines of those accretion gains should they occur. *Gould Wat. Sec. 162."*

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court directed to the

United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and to send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case entitled Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, executors and trustees under the will of Samuel F. Nirdlinger, deceased, respondents, vs. Henry E. Stevens, Jr., appellant, No. 2642, to the end that the said case may be reviewed and determined by this court, as provided by Sec. 240, Judicial Code; or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the Judicial Code, and that said judgment of the said Circuit Court of Appeals in said case and every part thereof may be reversed by this Honorable Court.

HENRY E. STEVENS, JR.,
Petitioner.

HARVEY F. CARR,
Solicitor.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } ss.

HARVEY F. CARR, being duly sworn according to law, on his oath says, that he is the solicitor of the petitioner named in the foregoing petition and the agent of the said petitioner in this behalf, and that deponent has had actual charge of the preparation and trial of the suits and appeals described in the foregoing petition, and that the statements of fact 10
contained in said petition are true.

HARVEY F. CARR.

Sworn to and subscribed before me this 15th day of October, A. D. 1921.

(Seal) THOMAS B. KENWORTHY,
Notary Public of N. J.
Commission expires June 6th, 1924.

20

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a writ of certiorari is, in the judgment of counsel, well founded, and is not interposed for delay.

Dated, Camden, N. J.,

October 15, 1921.

HARVEY F. CARR,
Attorney for and of Counsel
with Petitioner.



Motion for a Writ of Certiorari to the xvii
United States Circuit Court of
Appeals for the Third
Circuit

Now comes Henry E. Stevens, Jr., by his attorney in his behalf, and moves this Honorable Court that it shall by certiorari or other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit, require said Court to certify to this Court, for its review and determination, a certain cause in said Circuit Court of Appeals lately pending, herein your petitioner was the party appellant, the complete title of the cause being, Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, executors and trustees under the will of Samuel F. Nirdlinger, deceased, respondents, vs. Henry E. Stevens, Jr., appellant. That this motion may be granted your petitioner respectfully offers herewith his petition and brief in support thereof, also a certified copy of transcript of record of all proceedings in the United States Circuit Court of Appeals for the Third Circuit. All original documents are offered with the required number of copies. 10 20

Dated, Camden, N. J.,

October 25, 1921.

HARVEY F. CARR,
Attorney for and of Counsel 30
with Petitioner.

To the Respondents in the Above-entitled Matter:

10 Please take notice that on Monday, the 28th day of November, 1921, at the opening of the court on that day, or as soon thereafter as counsel may be heard, Henry E. Stevens, Jr., petitioner herein, will upon his petition and copies of the entire record of this action, submit a motion, a copy of which and of the petition for a writ of certiorari and brief in support thereof, are herewith delivered to you, to the Supreme Court of the United States, in its court room at the Capitol, in the City of Washington, District of Columbia.

Dated, Camden, N. J.,

October 25, 1921.

HARVEY F. CARR,

*Attorney for and of Counsel
with Petitioner.*

20

Appearance

Henry E. Stevens, Jr.,

Petitioner,

vs.

Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, Executors and Trustees under the will of Samuel F. Nirdlinger, deceased,

Respondents.

30

The clerk will enter my appearance as counsel for the petitioner.

(Name) HARVEY F. CARR,
(P. O. Address) 4th & Market Sts.,
Camden, N. J.

No. 538200

FILED

APR 9 1923

WM. R. STANLEY

CLE

IN THE
UNITED STATES SUPREME COURT

October Term, 1921.

HENRY E. STEVENS, JR.,
Petitioner,

v.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER,
and REAL ESTATE TITLE INSURANCE
AND TRUST COMPANY OF PHILADEL-
PHIA, Executors, &c.

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Third Circuit

**BRIEF FOR HENRY E. STEVENS, JR.,
PETITIONER**

HARVEY F. CARR,
*Attorney for and of Counsel
with Petitioner.*

Petition for Certiorari filed October 28, 1921.
Certiorari Return filed January 28, 1922.
(28,553)

No. 598.

IN THE
UNITED STATES SUPREME COURT

October Term, 1921.

HENRY E. STEVENS, JR.,
Petitioner,

v.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER,
and REAL ESTATE TITLE INSURANCE
AND TRUST COMPANY OF PHILADEL-
PHIA, Executors, &c.

**On Writ of Certiorari to the United States Circuit
Court of Appeals for the Third Circuit**

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SUPREME COURT OF THE UNITED STATES

HENRY E. STEVENS, JR.,
Petitioner,

v.

ARTHUR S. ARNOLD, ABRAM
L. ERLANGER and REAL
ESTATE TITLE INSURANCE
AND TRUST COMPANY OF
PHILADELPHIA, Executors
and Trustees under the
Will of SAMUEL F. NIRD-
LINGER, deceased,
Respondents.

On Writ of Certiorari
to Review Decree
of Circuit Court of
Appeals for the
Third Circuit.

BRIEF FOR PETITIONER.

SUMMARIZED STATEMENT OF FACT.

This writ of certiorari reviews the record and final decree of the Circuit Court of Appeals for the Third Circuit affirming a decree of the United States District Court for the District of New Jersey overruling the defense of *Res Judicata* set up by Stevens, the petitioner, and also adjudging the petitioner to have no right, title or interest, &c., in and to certain lands and premises in dispute in this action.

For convenience the designation "appellant" is used throughout this brief to designate the "petitioner" in this court, in order that the designation of the parties in the Circuit Court of Appeals may be preserved without change.

The bill was filed by the respondent to quiet title to certain lands along the Atlantic Ocean at Atlantic City, New Jersey, and was based primarily on the New Jersey Statute entitled, "An Act to compel the determination of claims to real estate in certain cases, and to quiet title to the same." 4 N. J. Comp. Stat. 5399. Appendix, p.

The *locus in quo* borders on the high water mark of the Atlantic Ocean, and has been formed by accretions or alluvion, and is illustrated by the shaded triangle bounded on the west by the easterly line of New Hampshire Avenue, as appears by a blue print map marked Exhibit D8, Appendix, facing p. 3a, in this cause, and attached to this brief. The disputed territory forms a part of a riparian grant made by the State of New Jersey to W. H. and E. S. Bartlett, dated June 2, 1900, and appearing upon the same blue print. At the time of the grant, the Bartletts, who were Stevens' predecessors in the title, were the owners of a lot of land beginning at a point 250 feet south of Pacific Avenue and lying immediately to the southward of lot marked "Jonah Wooten, 1854."

Both appellant and respondent claim by mesne conveyances through Atlantic Beach Front Improvement Company, which derived its title from John McClees, by deed dated March 9, 1897. The Atlantic Beach Front Improvement Company conveyed November 9, 1899, to William H. Burkhard. Burkhard and wife conveyed to William H. Bartlett and Elwood S. Bartlett November 29, 1899. While the Barletts were the owners a riparian grant was made

by the State of New Jersey to William H. Bartlett and Elwood S. Bartlett, April 30, 1900. The Bartletts conveyed the upland, together with lands covered by the riparian grant, to Stevens, by deed dated April 25, 1905. Record, pages 49 and 50.

The respondents acquired title in two parcels.

First: By deed from Atlantic Beach Front Improvement Company to States Avenue Land Company, by deed dated May 24, 1900, and by mesne conveyances the title thereto vested in the respondents. This land immediately adjoins Stevens' land on the east and is described as follows: Being a strip beginning at the southeast corner of Dewey Place and New Hampshire Avenue, 90 feet along the south line of Dewey Place 160 feet more or less to the high water mark of the Atlantic Ocean. Record, p. 35.

Second: By deed from Atlantic Beach Front Improvement Company to Henderson, Moss and Hancock, dated November 1, 1899, and by mesne conveyances title vested in the respondents. This parcel begins in the south line of Dewey Place, 90 feet east of New Hampshire Avenue, and extends thence east along Dewey Place 100 feet by south 350 feet more or less to the high water mark of the Atlantic Ocean, and immediately adjoins respondents' first parcel on the eastward, the two together making the lands described in the complainant's bill, having a frontage of 190 feet on Dewey Place, and extending southward to the high water line of the Atlantic Ocean as it then existed.

Since 1900 about 600 or 700 feet of land measured along New Hampshire Avenue has been added by accretions. In 1900 the line of high water was approximately convex in curvature. The present high

water line is of the same general character; in fact, all high water lines, as well as the exterior riparian line, are convex. See blue print, Exhibit D8 annexed, Appendix, facing p. 3a.

The final decree in this cause adjudged as follows:

1. That the matters and things decided in the suit in the New Jersey Court of Chancery "are not *res adjudicata* of the issues herein contained, and constitute no bar to the plaintiffs prosecuting this suit.

2. "That defendant (Stevens) has no right, title or interest in or encumbrance upon the said lands and premises in dispute in this action."

3. "That the cloud cast upon plaintiffs' lands by the riparian grant made by the State of New Jersey * * *, so far as the same overlaps the lands hereinabove last described (the *locus in quo*), is decreed to be null and of no effect, and that the lands and premises hereinabove last described (the *locus in quo*) are hereby decreed to be relieved of and clear from the lien or cloud occasioned by said riparian grant and by said deed from the State's grantees to William H. Bartlett and Elwood S. Bartlett, defendant's predecessors in title."

The following questions are thus presented:

I. Were the proceedings in the New Jersey Court of Chancery *res judicata* of the issues in this case?

II. If not, is the riparian grant to the appellant's predecessor in the title superior to and exclusive of the respondents' title by accretions?

III. Is the appellant's title by accretions to the locus in quo superior to the respondents' title by accretions? This involves the question as to whether the equitable method of division of a segment is by radial lines at practically right angles to the shore line, or by the protraction of the upland side lines.

IV. Whether by reason of certain conveyances of upland having been made with reference to New Hampshire Avenue, thereby that avenue was constituted a fixed boundary and impassable barrier separating as between co-terminous owners of the upland the accreted lands thereafter formed.

A bill was filed in the New Jersey Court of Chancery on October 2, 1909, against the *same* defendant and praying for the *same* relief in respect to the *same* property. The original bill claimed the locus in quo by reason of accretions "in front of said tract of land by alluvial deposits." Record, p. 16. An amended bill was filed in which the claim by accretions was abandoned, and a claim based upon deeds executed by John McClees and the heirs of Robert B. Leeds (a former owner) was substituted. Record, p. 20. At the final hearing in the Court of Chancery this amendment was made, and the defendant in that suit (Stevens) applied and was granted permission to answer the amended bill and also to include in the defendant's claim of title based upon a riparian grant, a claim by accretions (See State of the Case, *Dewey Land Co. v. Stevens*, p. 24. Appendix annexed, p. 4a.) In the Chancery suit the defendant there (Stevens) claimed under a riparian grant from the State of New Jersey as well as by accretions. After a hearing on the merits in the Court of Chancery an order was entered dismis-

sing the bill of complaint, which order, so far as material, reads as follows:

“And it appearing to the satisfaction of the Court that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill of complaint contained and set forth, and that said bill ought to be dismissed with costs:

“It is, thereupon, &c., ordered that the complainants’ bill of complaint be and the same is hereby dismissed with costs.” Exhibit E, Record, p. 30.

It is to be noted that in the original bill in the Court of Chancery the complainant there set up the fact of peaceable possession (Exhibit A, p. 17), and made the same claim in the amended bill (Exhibit B, p. 20). This fact was not denied, and, therefore, conceded, and thereupon the Court was invested with full jurisdiction to try the issue.

Vice-Chancellor Walker in his opinion in *Dewey Land Co. v. Stevens* (Exhibit D1, p. 110, Record Circuit Court of Appeals and for convenience printed in Appendix at p. 6a), finds that “the jurisdictional facts of peaceable possession in the complainant and no suit pending are present.”

From this final order or decree an appeal was taken to the New Jersey Court of Errors and Appeals, which latter court, after a hearing on the merits, entered a decree of affirmance and remitted the record to the Court of Chancery.

Subsequently the bill in the case *sub judice* was filed, and in the answer the defense of **Res Judicata** was set up in bar, as well as a defense on the merits based upon the **Riparian Grant** from the State of New Jersey and the claim by **Accretions**.

I.

RES ADJUDICATA.

1. The suits are identical in character, parties, privies, and in the prayers for relief.

2. Every title, right or claim asserted by the respondent were equally available to him in the New Jersey suit.

3. Possession of the complainant in the New Jersey suit (respondent) having been admitted, the appellant (defendant in the Chancery suit) became in effect the plaintiff in ejectment. Had the appellant shown no title the plaintiff in the Chancery suit would have won on his possessory title, and would have been entitled to an affirmative decree, and his bill could not properly have been dismissed.

4. The New Jersey suit was determined upon the merits, and the opposing claims of the parties were considered and there adjudicated. These opposing claims were as follows:

NIRDLINGER:

STEVENS:

(a) Possession

(a) Riparian grant.

(b) A paper title from

(b) Accretions.

the Leeds heirs.

A finding in favor of Stevens is a finding that the title offered by Stevens was superior to that offered by Nirdlinger. If Stevens had no title whatever (as found by Judge Haight) then Nirdlinger was entitled to succeed by virtue of his possession alone. In such a situation, Nirdlinger showing possession, and Stevens showing no title, Nirdlinger

would have been entitled to an affirmative decree in his favor, and Stevens would not have been entitled to a dismissal of the bill.

5. Nirdlinger was bound in the New Jersey suit, not only as to any matter which was offered and received to sustain his claim, or to defeat the claim or demand of Stevens, but as to any other admissible matter which might have been offered for that purpose, among which was the claim for accretions which was actually advanced in the original bill and voluntarily abandoned by the complainant therein.

6. The dismissal of the bill in the New Jersey court was not the equivalent of a non-suit, but was a dismissal after a hearing upon the merits, and such dismissal constitutes an adjudication adverse to every claim the plaintiff made or might lawfully have made in this suit.

7. Even though the decree of the New Jersey Court of Chancery, affirmed by the Court of Errors and Appeals might have been more specific in form, yet, in substance, it is an adjudication that the title asserted by Stevens was superior to that of Nirdlinger, and is sufficient compliance with the New Jersey Statute.

In any event this Court is not sitting in review of the decree of the New Jersey Court of Chancery as affirmed by the Court of Errors and Appeals, and its function is limited to determining whether or not there was an adjudication on the merits. If so, such adjudication must stand and cannot be corrected, amended or revised in this suit.

I. RES JUDICATA.

To correctly understand the problem involved it is necessary to consider the nature of a suit to quiet title under the New Jersey statute (4 N. J. C. S. 5399). Under the statute it is only incumbent upon the complainant in such a suit to set up the jurisdictional facts of peaceable possession, a hostile claim, and the fact that no suit is pending to enforce such claim. These facts being established the Court has jurisdiction to determine the controversy and the defendant is required to assert, set forth, and establish his title or claim. *Failing to do all of these things it is adjudged that he has no title or claim.*

Upon the establishment of the jurisdictional grounds the position of the defendant in the suit is shifted so that he becomes in effect a plaintiff in an ejectment suit. *Fittichauer v. Metropolitan Fireproofing Co.*, 70 N. J. Eq. 429, 431. In other words, *if the defendant makes no proofs of a title superior to the complainant's title by possession the complainant succeeds by virtue of his possessory title.*

Obviously a title by possession is better than no title, so that in order for a defendant to defeat the complainant in such a suit he must show and prove a title superior to the complainant's title by possession. Hence any adjudication or determination of the Court that the complainant is not entitled to relief carries with it as a necessary corollary the fact that the defendant has asserted and proved a title superior to that exhibited and proved by the complainant in such a suit.

Of course, the doctrine of *res judicata* applies not only to the claim or demand in controversy concluding the parties and those in privity with them, not

only as to any matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. See *Cromwell v. County of Sac.*, 94 U. S. 351.

It is perfectly obvious that in the Chancery suit not only was opportunity afforded to the complainant to base his claim upon accretions, but such claim was actually made by him and abandoned. He is, therefore, concluded in that suit, as well as in this, as to such claim.

Judge Haight dismisses this by a gesture and waves it aside by the single sentence: "But this is a *non sequitur*." But is it? Bearing in mind that if the defendant establishes no claim superior to that of the complainant's title by possession the defendant is defeated in the action, is it not inevitable that the Court of Errors and Appeals was compelled to balance the defendant's title as against the complainant's? And did this not necessarily involve a determination that the title asserted by the defendant under its riparian deed was superior to the complainant's title by possession? Did it not, so far as the law of the case is concerned, necessarily involve a determination as to the validity of the defendant's title under the riparian grant? If the riparian grant conferred no title upon the defendant, then the complainant was entitled to a decree of reversal adjudging that the defendant was entitled to no interest in the land.

The learned trial Judge then indulges in the following conjectures:

"It may be that the decision has established a new jurisdictional requirement, viz: That the plaintiff must establish some kind of title to the land in controversy before the defendant is required to set forth and establish his claim,

and in the event of his failure so to do the Court is not at liberty to entertain a bill filed under the statute in question."

The nature of the statutory action is discussed with great clearness by Vice-Chancellor Stevenson in *Fittichauer v. Metropolitan Fireproofing Co.*, *supra*. In that case the Court said:

"I think that great confusion has been made by this persistent effort of the complainant to state unnecessarily in his bill the claim which the defendant has made or is 'reputed' to have in respect of the land in question. If the complainant proves the jurisdictional facts the result is that the defendant is called upon affirmatively to set forth and maintain by proofs any adverse title or claim which he holds. The pleading of the defendant, if it sets forth a legal title, may be in effect a declaration in ejectment, and if it sets forth an equitable title, it may be in effect a bill in chancery. The complainant is under no obligation even to exhibit his own title until after the defendant has shown title. All that the complainant is obliged to show in the first instance is that he is in peaceable possession, and that no suit is pending in which the defendant's claim, whatever it may be, may be tested, and also, that he, the complainant, is unable to bring an action at law in which the test can be applied, *Jersey City v. Lembeck*, *supra*, and also, I think, that he, the complainant, is unable, except under the statute, to bring any suit in equity in which such test can be applied. *Van Houten v. Van Houten*, *supra*. When the complainant has shown these jurisdictional facts he awaits the presentation by a proper pleading of the defendant's claim or

title before making any disclosure of his own title."

"Complainant is under no obligation even to exhibit his own title until after the defendant has shown title" (70 N. J. Eq. at p. 43).

- A. "Upon a bill to quiet title, when the jurisdictional facts are shown, * * * it is for the defendant to establish his claim."

Graves v. Fancher, 81 N. J. Eq. 517 (N. J. E. & A. 1913).

- B. "Where, under a bill to quiet title (*Gen. Stat.* p. 3486), the complainant has established, to the satisfaction of the Court of Chancery, that he is in peaceable possession of the lands described in his bill of complaint claiming to own the same, and that his title is denied or disputed, and no suit is pending to test the validity of such hostile claim, the burden of establishing such adverse claim is upon the person setting it up, in which case the Court of Chancery may order that, in a feigned issue framed to test the validity of such claim, the defendant, or party setting it up, sustains the issue as plaintiff."

Ocean View Land Co. v. Loudenslager, 78 N. J. Eq. 571 (N. J. E. & A. 1911).

- C. "The purpose of the act is to relieve, not persons who have the power to test the hostile claim by a direct proceeding in the usual mode, but to aid persons whose situation afford them no such opportunity. * * * It lends its aid to one in peaceable possession under claim of ownership to compel an adverse claimant to establish his claim; he may do so in equity or at law, but

in either case he is asserting a hostile claim against one in peaceable possession, which he must proceed to establish or abandon."

Ocean View Land Co. v. Loudenslager, 78 N. J. Eq. at p. 575 (N. J. E. & A.).

- D. "Defendant assumes the burden of the affirmative on the issue of title, and carries the burden of establishing a title in conformity with the specification of title which the statute requires him to set forth in his answer."

Lambert v. Vare, 88 N. J. Eq. 81 (N. J. Chancery 1917).

- E. "Title by possession must prevail unless plaintiff establishes evidence of superior right to the possession."

19 C. J. 1076.

- F. "Defects in plaintiff's title constitute a good defense in an action against one in peaceable possession, although without color of title."

19 C. J. 1075.

- G. "Plaintiff who shows no title cannot recover whether defendant's title is valid or not."

Stephens v. Moore, 116 Ala. 297; 22 S. 542;

Doe v. Clayton, 81 Ala. 391; 2 S. 24.

- H. "It is a universal rule in ejectment that the plaintiff can recover only on the strength of his own title, and not on the weakness of his adversary's."

19 C. J. 1039.

- I. "The defendants have remained in possession of the premises, and the plaintiff can only re-

cover against them upon the strength and validity of his own title, but the defendants can defend their possession by attacking the validity and legality of the sale and conveyance to the plaintiff."

Meyers v. Conover, 65 N. J. L. 188 (N. J. Sup. Ct.).

This must be so, because until the defendant avers and proves a superior title the complainant would recover under his title by possession.

In view of the somewhat elaborate discussion of the rights of the defendant under his riparian grants from the state, two opinions having been filed in the cause, it is difficult to perceive why, if the Court desired to establish a new jurisdictional requirement in conflict with the statute and the adjudicated cases it would not have said so in plain and unmistakable language, and if this was its purpose the discussion of the rights of the defendant under the riparian grant appears to have been an idle waste of time on the part of an otherwise busy and industrious Court.

The second conjecture of the learned trial Judge is as follows:

"On the other hand its action in merely affirming the dismissal of the bill may have been due to the fact that upon examining the record it found that the deeds relied upon by the complainants conferred no title upon them, and consequently it adopted a *practical and convenient* way of disposing of the case, and thus rendering it unnecessary for it to determine whether or not the defendant had any interest in the land, and hence it advisedly merely dismissed the bill; the complainants being treated rather as interlopers without a shadow of title."

It is difficult to understand why the second conjecture should be prefaced by "on the other hand." The conjecture in its nature is practically the same as the first conjecture, and entirely ignores the fact that no complainant who establishes possession, and against whom a higher title is not asserted and proved, is an "interloper," but on the contrary is entitled to a decree adjudging that his adversary has no right, claim or demand upon the *locus in quo*.

The cases cited in the opinion in support of the above and also previously cited by counsel for the respondents, all deal with questions where the appeal was dismissed for want of jurisdiction. These cases are: *Steelman v. Blackman*, 72 N. J. Eq. 330 and *Oberon Land Co. v. Dunn*, 60 N. J. Eq. 280. In the *Blackman* case an action of trespass at law was available and in the *Dunn* case, both parties had conveyed their interests prior to hearing and neither party had any rights in the land to be bound by the decree.

The Court of Chancery, in its opinion, found as a fact that "the jurisdictional facts of peaceable possession in the complainant and no suit pending, are present."

A "practical and convenient way of disposing of the case" would have been for the Court to have said: "The Court below was without jurisdiction to entertain this bill because certain jurisdictional facts (specifying them) are not established in this case." This course would have saved the Court much labor and research on the riparian grants involved. *It could not have said this, however, because all of the jurisdictional facts prescribed by the statute were established.*

It seems to us impossible to read the opinion of Justice Swayze and of Judge White in the New Jersey Court of Errors and Appeals and reach the con-

clusion that this case was not decided in that court on the ground that the defendant's riparian claim was superior to the complainant's claim. Indeed, the third syllabus in that case says:

“HELD: That plaintiffs could not sustain their claim to the land under the grants to the former owners as *against the state's riparian grant.*”

(In New Jersey the syllabi are prepared by the Court.)

It appears in the opinion of Mr. Justice Swayze that the bill originally filed claimed title by accretion, and that this claim was abandoned, and by an amended bill the complainant set up title by deed from former owners.

The reason why the claim for accretion was not tried in the Chancery suit was because of its voluntary abandonment by the complainant therein. He had full and fair opportunity to litigate that question in the Chancery suit. He chose, however, to abandon it, but he is bound to the same extent as though he had actually litigated the case on the theory of accretions. He has no right to reopen litigation which is closed by the final decree of a court of last resort. He has no right to relitigate a controversy settled by the decree of the court of last resort in order to try the case upon a ground voluntarily abandoned by him in the first suit. Litigation would be unending if litigants are to be accorded a right to try the case repeatedly upon grounds that were available in the first suit.

In the opinion below the learned trial Judge said:

“I accordingly conclude that the New Jersey decree is not *res adjudicata* of the questions in this case. If a contrary conclusion was reached there would be presented a situation where, al-

though the title or interest of the defendant had never been settled, neither party would ever be able to procure a decree under the statute setting at rest the title to the land. Indeed the practical effect would be to confirm the defendant's claim of title to land of which the complainant was and is in peaceable possession, not because it had ever been so decreed by any court, but because in a previous suit the complainant had failed to establish his title."

This seems to beg the question. If this Court is of the opinion that this case was tried on its merits in the Court of Chancery and the Court of Errors and Appeals of New Jersey, and that the determination of such case necessarily adjudged that the defendant's claim was superior to that of the complainant, then the matter is *res judicata*, be the inconvenience what it may. If the doctrine of *res judicata* is established it would not be a difficult matter for the appellant out of possession, whose rights had been adjudged to be superior to those of the person in possession, to obtain judicial relief in the proper forum and by the proper proceedings. It might be suggested that a suit in ejectment would be available as an effective means to accomplish the desired result.

In disposing of the defense of *res judicata* the sole question is: Did the New Jersey Court of Chancery and the Court of Errors and Appeals determine the case on the merits, and did it find that the defendant's title was superior?

The plaintiff says the matter is not *res judicata* because—(a) The plaintiff's claim by accretions was not passed upon in the New Jersey suit. (b) Be-

cause the present suit is a *quia timet* suit for the purpose of removing a cloud upon the title, and under the general equity power of the Court as distinguished from a suit under the New Jersey statute.

Are these reasons sound? and do they differentiate this suit from the New Jersey suit? Is there anything in this suit that could not and should not have been tried in the New Jersey suit?

The purpose of an equity suit is best determined by an examination of the prayer for relief.

For convenient reference the prayers in the original and amended bills in the New Jersey Court of Chancery and in the bill in this cause are placed in parallel columns.

THE PRAYERS FOR RELIEF.

NEW JERSEY COURT OF CHANCERY.

ORIGINAL BILL.

"To the end, therefore, that the defendants may in manner aforesaid answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they or either of them make or claim, and to what part or what interest; and further how, and by what instrument such title is claimed or derived or was created; and that by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed, and settled, and that your orators may be decreed to have a perfect title thereto, and the defendants to have no estate, interest in, or encumbrance on said lands or any part thereof, and that their claims to the same are unjust, vexatious and void."

AMENDED BILL.

"To the end, therefore that the said defendants and either of them, may, but without oaths or affirmations, to the best of their respective knowledge, information and belief full, true, direct and perfect answer make to all and singular the matters aforesaid, and more particularly that they and either of them may in manner aforesaid answer and set forth specifically what title or claim to said lands or any part thereof, or any interest therein, they or either of them make or claim, and to what part and what interest; and further how, and by what instrument such title is claimed or derived or was created; and by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and that your orators may be decreed to have a per-

U. S. DISTRICT COURT

BILL OF COMPLAINT.

"To the end, therefore, that the said defendant, Henry E. Stevens, Jr., may, but without oath or affirmation, to the best of his knowledge, information and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and more particularly that he may in manner aforesaid answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, or encumbrance thereon, he makes or claims; and to what part and what interest; and further how and by what instrument such title is claimed or derived or was created; and by the determination and final decree of this court that the rights of all the parties to this suit in and to the lands hereinabove set forth, and every part thereof, may be fixed and settled, and that your orator may be decreed to have a perfect title thereto, and that

fect title thereto, and the defendants to have no estate, interest in or encumbrance upon the said lands, or any part thereof, and that his claims to the same are unjust, vexatious and void.

the said defendants to have no estate, interest in or encumbrance upon the said lands, or any part thereof, and that his claims to the same are unjust, vexatious and void, and that ~~the~~ cloud upon the title of your orator to said lands and premises created and occasioned by the alleged riparian grant hereinabove referred to, and the deed of conveyance from William H. Bartlett and Elwood S. Bartlett and wife to the defendant hereinabove referred to, may be, so far as said lands and premises are concerned, declared and decreed to be null and void, and of no effect as against your orator, and that your orator's right in and title to said lands and premises may be decreed to be relieved from the lien of the cloud occasioned by said alleged riparian grant and deed of conveyance, and that said defendant, Henry E. Stevens, Jr., may be likewise decreed to have no title or interest in or to said lands and premises by reason of said alleged riparian grant and deed."

**THE ADDITIONAL MATTER APPEARS IN
ITALICS AND AT BEST IS BUT
SURPLUS VERBIAGE.**

Without the added matter the plaintiff prayed that he might be decreed to have a perfect title and the defendant to have no estate, interest in, or encumbrance upon the said lands, etc. No additional force is given to the prayer which asks that the defendant be decreed "to have no estate, interest in, or encumbrance upon the said lands and premises by reason of said alleged riparian grant and deed." It is axiomatic that the greater includes the less. Indeed, Judge Haight, in his opinion, says:

"Sometime prior to the institution of this suit the present plaintiff and a corporation known as the Dewey Land Company, being at that time tenants in common of the land in question, brought a suit in the Court of Chancery of New Jersey under the same statute against the *same* defendant and therein sought the *same* relief in respect to substantially the *same* property as is sought in the present suit, except that the prayer for relief in the bill in the former suit did not, as does the bill in the present suit, specifically pray for the removal of the before mentioned alleged cloud upon the title" —

the "alleged cloud" being the claim under the riparian deeds set up by the defendant in the New Jersey suit.

The principal ground advanced by the plaintiff why the New Jersey decree was not *res judicata* is the following appearing upon the complainant's brief in the court below:

“The issues in a bill to quiet title under the statute are determined by the defendant. The title that he asserts, whether one or more, constitutes the issue or issues in the cause. Under the statute *there is no opportunity for the complainant to alter or vary the issue*, to wit, the title claimed by the defendant, hence it is beside the question for defendant now to assert that complainant should have litigated some claim not litigated in that suit.”

Is this assumption well founded? Bearing in mind that the statutory suit to quiet title is in effect a suit in ejectment, with the parties standing in the reverse order, and that the defendant is, therefore, the plaintiff in ejectment, can it seriously be contended that the issue is limited solely to the examination of the title presented by the defendant (plaintiff in ejectment), and that no opportunity is given to the opposite party to show a superior title? If the issue to be tried is: “Is the title or right of the defendant superior to that of the complainant?” then manifestly the Court must examine all of the claims of both of the parties to the suit. It is only upon the theory that the Court in a suit to quiet title does *not* try all of the claims between the parties, and does *not* permit the complainant to assert all of his claims that the complainant’s contention would be entitled to any weight. That the complainant is not so restricted is self-evident.

The plaintiff is trying in this very cause, in the same form of action, and based upon the same statute, the identical issues which he tried in the New Jersey court. If the claim by accretions is available here why was it not available in the New Jersey suit? And if it is not available under the New Jersey statute how does it become available here?

In the trial Court the plaintiff in his brief advanced the following argument:

“As we have already seen the complainant, in a bill under the statute to quiet titles, whose possession of the *locus in quo* is not questioned, is not compelled either to allege or prove the source of his title, or, indeed, that he has any title until and unless the defendant shows some interest or title in the lands. *Thereupon complainant is required to show that the said interest or title is not a valid interest or title to the lands. This he may do by showing an inherent defect in the claim or title asserted, or by showing that he has a superior title thereto.* Hence if, as in the New Jersey case and here, that possession is undisputed, the burden is at once cast upon the defendant to open and maintain his case affirmatively, and to establish the validity of his claim or title to the property in the complainant's possession.”

This is a correct statement of the law, but is absolutely in conflict with the position taken by the plaintiff, in the brief submitted in the court below, to wit, that “under the statute there is no opportunity for complainant to alter or vary the issue, to wit, the title claimed by the defendant.”

QUIA TIMET.

An attempt is made to escape from the doctrine of *res adjudicata* by giving the case a different aspect, by asserting “an independent claim under the general jurisdiction of the Court to have the cloud arising from the riparian grant removed,” based upon general equitable principles of *quia timet*.

This is untenable. The statutory action is broader than the *quia timet* action, and every claim available under the latter is equally available under the former.

“Statutes have been enacted in many states providing, in substance, that an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest, and to quiet title. These statutes operate on the old action to quiet title, which under the common law, *could not be maintained until the party in possession had been harrassed by repeated actions at law, and they gave an additional remedy in equity*, but since they gave it only to the party in possession, they have no effect on the rule that the aid of equity cannot be invoked where an adequate remedy at law exists.”

32 Cyc. 1310.

The respondents in their brief in the Circuit Court of Appeals cite in support of the asserted difference between the statutory action and the *quia timet* action, the following cases:

- (a) *Nixon v. Walter*, 41 N. J. Eq. 103;
- (b) *Sheppard v. Nixon*, 43 N. J. Eq. 627;
- (c) *American Dock & Improvement Co. v. Trustees for the Support of Public Schools*, 39 N. J. Eq. 409,

(a) merely held that the complainant out of possession, and who had brought his suit under the statutory action, could maintain the same as a suit *quia timet* irrespective of the statute. This case was reversed by the New Jersey Court of Errors in (b) *Sheppard v. Nixon*, *supra*, holding that the court

of equity had no jurisdiction, and that the remedy of the complainant in that case was by an action of ejectment at law. (c) *American Dock & Improvement Co. v. Trustees*, does not deal with the subject of *quia timet* in any way whatever, and, therefore, has no applicability.

In the New Jersey case possession, no action pending, and the existence of a hostile claim having been proven, in the language of the statute it became "lawful for such person so in possession to bring and maintain a suit in chancery to settle the title of said lands, and to clear up *all doubts and disputes concerning the same*; the bill of complaint in such suit shall describe the lands with certainty, and shall name the person who claims, or is claimed or reputed to have such title or interest in or encumbrance on said lands, and shall call upon such person to set forth and specify his title, claim or encumbrance, and how and by what instrument the same is derived or created." 4 N. J. Comp. Stat. 5399.

The Court of Chancery "shall * * * upon such inquiry and determination finally settle and adjudge whether the defendant has any estate, interest or right in, or encumbrance upon said lands, or any part thereof, and what such interest, estate, right or encumbrance is, and in or upon what part of said lands the same exists." 4 N. J. Comp. Stat. 5408.

The issue, therefore, to be tried is whether or not the title set up by the defendant is superior to the title of the complainant. This issue makes available every title, claim, lien or encumbrance of either party to defeat the other.

The rule was correctly set forth by the respondents in their brief submitted to the trial Court in the following language:

“As we have already seen, the complainant, in a bill under the statute to quiet titles whose possession of the *locus in quo* is not questioned, is not compelled either to allege or prove the source of his title, or, indeed, that he has any title until and unless the defendant shows some interest or title in the lands. *Thereupon complainant is required to show that the said interest or title is not a valid interest or title to the lands. This he may do by showing an inherent defect in the claim or title asserted, by showing that he has a superior title thereto.* Hence if, as in the New Jersey case and here, that possession is undisputed, the burden is at once cast upon the defendant to open and maintain his case affirmatively, and to establish the validity of his claim or title to the property in the complainant’s possession.”

The above is a correct statement of the law, but absolutely in conflict with the position taken by the respondents in their brief in the Circuit Court of Appeals, to wit, that “under the statute there is no opportunity for complainant to alter or vary the issue, to wit, the title claimed by the defendant.” It seems puerile to attempt to maintain that under a statute broader in its scope than the *quia timet* action a complainant is not permitted to assert a superior title to that set up by the defendant and thus defeat the action. The title to the act is, “An act to compel the determination of claims to real estate in certain cases and to quiet title to the same.”

“The jurisdiction conferred upon the Court of Chancery by the statute is merely an extension of its function to entertain bills *quia timet*

to remove clouds from the title of persons in possession of real property."

McAndrews & Forbes, v. City of Camden,
78 Atl. Rep. 232, 233 (N. J. Ct. of E. & A.).

The alleged "cloud upon the title" was the State's riparian grant, which was directly in issue in the New Jersey suit as well as in this suit. The plaintiff gains no additional rights by merely designating the adverse claim as a "cloud upon the title," for the reason that under the statutory action the defendant is required to set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, the defendant makes or claims, and to what part or what interest; and further how and by what instrument such title is claimed or derived or was created; and the prayer is "that by the determination and final decree of this Court the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled, and that your orators may be decreed to have a perfect title thereto, and the defendants to have no interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void."

Certainly the "cloud on the title" is embraced within the intendment of the statute and the broad prayer for relief in the bill of complaint.

Vice-Chancellor Walker in his opinion in *Dewey Land Co. v. Stevens*, Appendix, p. 6a, find that "The jurisdictional facts of peaceable possession in the complainant and no suit pending, are present." These were precisely the same jurisdictional facts that are found by Judge Haight in his opinion, at page 330, lines 32 and 33.

Some capital is attempted to be made out of the refusal of Vice-Chancellor Backes in an opinion reported in 85 N. J. Eq. 374, 96 Atl. Rep. 362, to amend the decree of the Court of Chancery by making the same more specific. This motion was denied, not on the merits of the application, but because the Vice-Chancellor conceived that the Court of Chancery was without power to amend a decree after the same had been affirmed by the Court of Errors and Appeals. He says in his opinion:

“The motion, in effect, is to amend the decree of the Court of Appeals. Upon a simple affirmance on the merits, there is nothing further for the lower court to do in the case but to enter the mandate and enforce the judgment.”

CONCLUSIVE EFFECT OF JUDGMENT ON THE MERITS.

A judgment if rendered upon the merits constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy concluding the parties and those in privity with them, *not only as to every matter that was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.*

The above doctrine is supported by *Cromwell v. The County of Sac*, 94 U. S. 351; *Paterson v. Baker*, 51 N. J. Eq. 49; *Clark Thread Co. v. Wm. Clark Co.*, 55 N. J. Eq. 658.

The plaintiff attempts to show from the cases above cited that this rule applies only in situations where the cause of action is the same, and that the cause of action in the case *sub judice* differs from the cause of action in the New Jersey suit, hence

that the rule is not applicable. It is elementary that if in the first suit no opportunity was available to present under the form of action a cause of action or defense, that the parties cannot be concluded by the earlier adjudication, because the effect of such a holding would be to deny such party any opportunity to be heard. If no opportunity existed in the first suit, and a defense was not available in the second, it is evident that the party never could be heard upon the merits. The answer is that the matter was not previously adjudicated; that there was no opportunity to adjudicate it, and that hence the matter could not be *res judicata*.

In *Cromwell v. The County of Sac*, it was held that there had been no previous opportunity to raise the question mooted in the second action, to wit, that the plaintiff therein was a *bona fide* holder for value of certain municipal bonds. In the case *sub judice* the plaintiff not only had the opportunity to base his claim upon accretions, but actually did so, and voluntarily abandoned such claim.

The case of *Paterson v. Baker*, 51 N. J. Eq. 49, supports the appellant Stevens' contention. In that case the plaintiff had issued 200 coupon bonds, certain of which had gone into the possession of John Petrie. Two of these were stolen from Petrie, and subsequently after public notice of the theft had been given, the complainant, after receiving a bond of indemnity paid Petrie the full value of the bonds. The stolen bonds came later into the possession of Baker, the defendant, who presented them for payment, and upon payment being refused brought suit against the complainant to recover the amount due on the coupons attached to the bonds. The defense that Baker was not the *bona fide* holder was upheld. Baker died leaving a will which made his wife executrix. The city then brought suit in Chancery against

the widow to have the bonds surrendered for cancellation, and it was held, upon the latter's attempt to show that she was a *bona fide* holder of the same; that this question had been finally determined and was *res judicata*.

Clark Thread Co., v. Wm. Clark Co., 55 N. J. Eq. 658. The opinion in that case reveals the fact that the complainant had previously brought suit in the United States District Court for an injunction against the use of a trade-mark and for accounting for profits realized by its use. The suit instead of being directed against the company using the trade-mark had been brought against the latter's manager who served the company on a salary. The Federal Court allowed an injunction but refused to consider the prayer for an accounting because no profits could be shown against the defendant. The second suit reported under the above title was against the company itself and prayed for an accounting. The Court held that though there was an identity of parties in the two suits (treating the principal and agent as one), the rule of *res judicata* would not apply in view of the fact that under the first suit it had been impossible to show profits.

"It is entirely clear from the record in the preceding case and the testimony in this, that this was the reason why the decree in the former case was silent upon the question of accounting. It appeared in the evidence of the preceding case, without contradiction, and was stated in the brief of counsel for the defendant in that case, that Armitage was an employe of the William Clark Company upon a stated salary, beyond which he received nothing. All the profits received from sales made through his agency went to the present defendant. If the agent received no profits, it did not follow that the

principal received none. Therefore, the decree in the first case, based upon the fact that the agent had received no profits, could not conclude the complainant from an accounting against the principal for profits which it had received. The two decrees can stand together."

55 N. J. Eq. 667.

II.

THE RIPARIAN GRANT.

The riparian grant under which Stevens claims was made by the State of New Jersey through its riparian commission to William H. and Elwood S. Bartlett, predecessors in the title, by deed dated June 28, 1900. Exhibit D6, pages 217-220. This was a conveyance not merely of the shore (the lands lying between the high and low water marks), but by definite fixed metes and bounds described in the deed as follows:

"Beginning at a point in the high water line of the Atlantic Ocean as the same existed in May, 1900, said point being distant 325 feet southerly at right angles from the southerly line of Pacific Avenue and 175 feet easterly at right angles from the easterly line of Vermont Avenue, and from said beginning point southerly parallel with Vermont Avenue and distant 175 feet easterly at right angles from the easterly line of the same, 185 feet to a point in the easterly line of lands under water granted by the State of New Jersey to Walter B. Dick, December 28, 1899; thence southeasterly in a straight line and along the easterly line of lands as granted to Walter B. Dick 729.38 feet

to a point in the exterior line established by the Commissioners * * *; said point being distant 378 feet northeasterly along said exterior line from where it is intersected by the easterly line of Vermont Avenue extended southerly; thence northeasterly along said exterior line curving to the left on a radius of 4,000 feet, 494 feet to a point; *thence northwesterly in a straight line 744.39 feet to a point in the high water line of the Atlantic Ocean where the same is intersected by the westerly line of New Hampshire Avenue, said point being distant 250 feet southerly from the southerly line of Pacific Avenue*; thence southwesterly along said high water line to the place of beginning."

Considerable testimony was introduced for the purpose of showing that many years ago the high water line was further oceanward than at the present time, and that the ocean had worked landward until in 1869 or 1870 the high water line was at the intersection of Vermont and Pacific Avenues (see blue print map Exhibit D8), and that much of this loss had been occasioned by avulsion.

AVULSION.

Considerable space has been devoted by the respondents in their brief in the Circuit Court of Appeals to a discussion of the legal consequences of avulsion as applied to the *locus in quo*. Since both appellant and respondents claim title from a common grantor, viz: the Atlantic Beach Front Improvement Company, and both are in the position of conceding the title of that grantor to be good to the high water mark at the time of the respective conveyances to

the appellant and respondents, the question of whether the original losses resulting from erosion or avulsion is wholly immaterial, and requires no further comment or discussion in this brief.

The New Jersey statute which is the basis of the riparian grant in question is to be found in 4 N. J. Comp. Stat., p. 4832. For convenient reference the relevant portions of the statute is printed in Appendix to this Brief, p. 1A. This statute creates a riparian commission empowered to make grants of lands under water upon the terms therein prescribed, but gives a preemptive right to the riparian owner to obtain such a grant, and further provides that a grant may be made to a person other than a riparian owner after six months' notice to the riparian owner, and the neglect or refusal of the riparian owner to make application and to pay the price fixed by the Commission.

Before discussing in detail the New Jersey cases the following propositions are submitted as definitely established by adjudicated cases in the State of New Jersey:

(A) The state is the absolute owner of the land in all navigable waters within its territorial limits, and the state by its riparian grant, describing the lands granted by definite metes and bounds, conveys an absolute title to appellant's predecessor in the title.

(B) A riparian owner has no right of adjacency.

(C) The preemptive right of a riparian owner to a grant is not a vested right, but is merely granted by the legislature as a matter of grace.

(D) A riparian owner is not entitled to compen-

sation for the loss of the benefit of accretions where a grant is made to third persons.

(E) If a grant may be made to a person other than the riparian owner without compensation to the latter, then on principle the state may make a riparian grant that shall have fixed and not ambulatory boundaries.

(F) While the state had a right to make a grant of the "shore" with ambulatory boundaries, it did not do so, but prescribed by metes and bounds the fixed boundaries of its grant.

(G) *The riparian owner's right to accretions is a permissive one—a tacit license from the state—and is terminated upon the state making a riparian grant with fixed and definite boundaries. Therefore, the riparian grant to the appellant's predecessors in title is superior to the respondents' claim by accretions.*

(A) *The state is the absolute owner of the land in all navigable waters within its territorial limits, and the state by its riparian grant, describing the lands granted by definite metes and bounds, conveyed an absolute title to appellant's predecessor in the title.*

The riparian grant, Exhibit D6, page 217, omitting recitals and irrelevant matter, is in the following form:

"Now, therefore, the said State of New Jersey, by the said riparian commissioners, the governor approving, in consideration of the

premises, the terms and conditions hereinafter contained, and the sum of nine hundred and thirty 00/100 (\$930.00) dollars duly paid by the said William H. Bartlett and Elwood H. Bartlett to the said state, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey, subject to the terms, covenants, conditions and limitations herein contained, unto the said William H. Bartlett and Elwood S. Bartlett, and to their heirs and assigns forever—All that parcel of land flowed by tide water lying at Atlantic City, in the County of Atlantic and State of New Jersey, described as follows:

(The description already appears in this brief and is here omitted.)

“With the right and privilege, under the covenants and conditions of this grant, to exclude the tide water from so much of the lands above described as lie under tide water by filling in or otherwise improving the same, and to appropriate the lands under water above described to their exclusive private uses.

• • • • •
“And also provided, that if the said William H. Bartlett and Elwood S. Bartlett are not the owners of the land adjoining the land under water hereby granted, then and in that event this instrument and conveyance, so far as the same binds the state, and all the covenants herein on the part of the state, shall be void as affecting any part or parts of said land which joins land not owned by the said William H. Bartlett and Elwood S. Bartlett.

• • • • •
“Together with all and singular the heredit-

aments and appurtenances thereunto belonging.

"To have and to hold and all singular the above granted and described lands under water and premises, subject to the terms, conditions and limitations as aforesaid, unto the said William H. Bartlett and Elwood S. Bartlett, and to their heirs and assigns forever."

This grant was executed by the State of New Jersey under the great seal of the state and signed by the governor and the members of the riparian commission.

This language is identical in substance with that contained in the grant construed by this Court in *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 689, where the Court says:

"For the same reason it was declared in the Act of March 31, 1869, that the conveyance or lease of the Commissioners under the act should not merely pass the title to the land therein described, but the right to reclaim and fill in and otherwise improve the same, and 'to appropriate the land to exclusive private uses.'"

The language of the grant in the case *sub judice* is that the State of New Jersey "does hereby grant, bargain, sell and convey * * * unto the said William H. Bartlett and Elwood S. Bartlett and to their heirs and assigns forever, All that parcel of land, etc., * * * with the right and privilege, under the covenants and conditions of this grant, to exclude the tide water from so much of the lands above described as lie under tide water, by filling in or otherwise improving the same, and to appropriate the lands under water as above described to their exclusive private uses."

This was precisely the character of the grant in *Hoboken v. Pennsylvania Railroad*. There the Court, at page 691, says:

“Having in view the manifest policy of this legislation and the force and meaning of its language, we do not hesitate to adopt the conclusion that the several grants of the state to the United Companies under the Act of March 31, 1869, to enable them to improve their lands under water at Kill von Kull and other places, and the grant under the general act of the same date under which the other defendants claim, or intended to secure to the grantees *the whole beneficial interest and estate in the property described to their exclusive uses for the purposes expressed and intended in the grant*. And construing these conveyances most strongly in favor of the public, and yet so as not to defeat the grants themselves, we also conclude that the rights conveyed *exclude every right of use or occupancy on the part of the public* in the land itself. The land granted is specifically described by metes and bounds. The grant is a grant of the estate in the land and not of a mere franchise or incorporeal hereditaments. The uses declared are such as require an exclusive possession by the grantees that they may hold, possess, improve and use the same for their own use and profit according to the nature of the business which by law they are authorized by law to take. *In other words, under these grants the land conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute titles, and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred or extin-*

guished, except such sovereign rights as the state may lawfully exercise over all other private property."

Hoboken v. Pennsylvania Railroad, 124 U. S. 656, 691.

The above case was followed and approved by the New Jersey Supreme Court in *Elizabeth v. Central Railroad Co.*, 53 N. J. L. 491.

"The state is the absolute owner of the land in all navigable water within its territorial limits, and such land can be granted to anyone, either public or private, without making compensation to the owner of the shore."

Stevens v. Paterson & Newark Railroad, 34 N. J. L. 532 (E. & A.).

The respondents deny that an absolute title was vested by the riparian grant, and advance the following reasons:

(a) That the title of the state to the high water mark is a shifting one depending upon the changes in the high water mark, and that anyone who takes title from the state to land under water takes it with an ambulatory boundary. The obvious answer, however, is that the state in this case did not convey the land with an ambulatory boundary, but by specific metes and bounds. Further discussion of this subject is to be found in sub-division (e) under this caption.

(b) It is urged that on the authority of *Polhemus v. Bateman*, 60 N. J. L. 163, that until the grantees reclaim the land they acquire no exclusive right to it, except so far as might be necessary to enable them to make reclamation. The *Polhemus* case con-

strued the deed in that particular case, and in an action brought by the riparian grantee for trespass against a person entering and fishing upon the submerged lands included within the grant. What the language of the deed was does not appear in the opinion. The opinion, at page 167, however, makes use of the following language:

"The deed was executed in the prescribed form, but it *does not*, in terms, grant all the rights of the state in said lands to the grantee. On the contrary, it contains the provision herebefore recited, setting forth the purposes for which said conveyance was made. That provision was manifestly intended to give to the grantee such rights as he would have been entitled to under a grant made exclusively under the eighth section of the Act of 1869.

"That section provides that, upon delivery of the deed, 'the grantee may reclaim, improve and appropriate to his and their own use the lands conveyed.'

"The statute does not require that this provision shall be inserted in the deed; it does not enter into the form of the conveyance, but simply provides what its effect shall be when delivered. *That effect must be accorded to it unless it contains some provision narrowing its scope.*

"*So it may be admitted that the deed to Bateman, under the Act of 1871, in the absence of any language limiting its operation and effect, would have passed to him all the rights of the state in the lands under water, but the deed contains the provision that he is to have the right, liberty, privilege and franchise to exclude the tide water from so much of the lands as lies under tide water by filling in or otherwise im-*

proving the same, and to appropriate the lands to his exclusive private uses."

What it was in the deed that had the effect of limiting the operation and effect of the language of the statute, and which otherwise "would have passed to him all the rights of the state in the lands under water" is not apparent. Certainly the inclusion in the language of the grant of the right "to exclude the tide water from so much of the lands as lies under tide water by filling in or otherwise improving the same, and to appropriate the lands to his exclusive private uses" was not a restriction upon the grant.

From the conclusions of the Court it would appear that the language of the grant was that the grantee "may fill in or otherwise improve the same, and appropriate the lands when *so improved* to his exclusive private uses."

At any rate the employment of equivalent language in the grant in *Hoboken v. Pennsylvania Railroad* was held to be construed to vest in the grantee title on the same terms on which all other lands are held by private persons under absolute titles.

Certainly *Polhemus v. Bateman* was not intended to decide any general doctrine of riparian law, but was limited to the construction of the particular deed before the Court, and what that deed was does not clearly appear in the case. At any rate it cannot be said that if one had a right under a grant to appropriate to his exclusive private use lands when *artificially* improved or reclaimed, and that if such lands were "improved" by *natural accretion* that he had no rights whatever. It would be a palpable absurdity to say that when the result was produced by accretion, and the waters were by that means excluded, that he was required to do the futile

and impossible thing of "reclaiming" the same lands by artificial means. Can it be seriously argued that when the State of New Jersey makes such a grant it intends to say to its grantee: "We grant you these lands and give you the right to exclude the waters therefrom by *artificial* means, but if the waters are excluded by *natural* means, viz: by accretions, your title fails"?

(B) *A riparian owner has no right to adjacency.*

Up to 1870 the courts of New Jersey had consistently recognized in riparian or littoral owners a natural right to maintain their adjacency to high water. *Bell v. Gough*, 21 N. J. L. 662, 23 N. J. L. 624. This doctrine was overruled in *Stevens v. Paterson & Newark R. R. Co.*, 34 N. J. L. p. 532 (E. & A.). The Stevens case has been followed by all of the later cases. The Stevens case holds as follows:

"The state is the absolute owner of the land in all navigable water within its territorial limits, and such land can be granted to anyone, either public or private, without making compensation to the owner of the shore."

Stevens v. Paterson, etc., R. Co., p. 532.

"It must now be accepted as the established law in New Jersey, that the right of the owner of lands bounding on a navigable river extends only to the actual high water mark, and that all below that mark belongs to the state. The inchoate right, if such it may be called, which the proprietor of the upland has, either with or without a license, to acquire an exclusive right to the property, by wharfing out or otherwise improving the same, gives him no property in the land while it remains under the water. It

may be granted by the state to a stranger at any time before it is actually reclaimed and annexed to the upland."

Stevens v. Paterson, etc., R. Co., p. 546.

"The steps which I have thus far taken have let me to this position: That all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as an incident of his estate, and that the privileges he possesses by the local custom or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature."

What the Court *actually* found in *Stevens v. Paterson, etc., R. Co.* is indisputable and is succinctly set forth in the first syllabus.

"The state is the absolute owner of the land in all navigable waters within its territorial limits, and such land can be granted to anyone, either public or private, without making compensation to the owner of the shore."

(In New Jersey the syllabi are prepared by the Court.)

The essential difference between Judge White's conclusions and Justice Swayze's, are that Justice Swayze finds that if title was lost by erosion it became the property of the state, not merely as long as it remained under water, but, if the state made a riparian grant, absolutely; while Judge White, speaking for himself alone and not for the majority of the court, says:

"I think that what the owner has *not* lost is his right, within the statutory period in this state, to toll the running of such adverse possession and defeat its ripening into absolute ownership, by regaining possession of his land * * *, by actually ejecting the ocean from his land and restoring it by artificial means to its former condition as dry or fast land, or by having it, within the like period, restored to him through the voluntary action of nature should the ocean within that time recede."

Dewey Land Co. v. Stevens, 83 N. J. Eq., at p. 661.

This conclusion is supportable neither upon principle nor by authority, and is in absolute conflict with the majority opinion of Justice Swayze in *Dewey Land Co. v. Stevens*, and would lead to hopeless and inextricable confusion in practice. *Stevens v. Paterson, etc., R. Co.*, holds that the state is the absolute owner of the land under all navigable water within its territorial limits, and such land can be granted to anyone, either public or private, without making compensation to the owner of the shore, while under Judge White's theory the state's grantee could be dispossessed of that portion of the lands granted which at any time during the twenty years prior to the making of such grant had been fast land.

"The result is that there is no legal obstacle to a grant by the legislature to the defendants, of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark. It may be true that by such an appropriation, the plaintiff will sustain a great inconvenience than will other citizens whose lands do not run along

this river. But the injury to all is in its essence and character the same, the difference being only in degree."

Stevens v. Paterson, etc., R. Co., p. 549.

(C) *The preemptive right of a riparian owner to a grant is not a vested right, but is merely granted by the legislature as a matter of grace.*

Stevens v. Paterson, etc., R. Co., 34 N. J. L. 532, 549.

"The preemption given by the eighth section of the Riparian Act of 1860, to the riparian owner, is of grace, and not of right."

American Dock & Imp. Co. v. Trustees, 39 N. J. Eq. 409.

"The provisions for notice to the riparian owner before sale to a stranger was not the result of a necessity, but was a gratuitous concession on the part of the state which it had the power to withdraw at will. It was of grace and not of right. The provision for compensation to such owner was not a recognition of any absolute right or interest on his part as such, for it is guarded by a qualification which forbids such a conclusion. Provision is made for compensation only in case the riparian owner has any rights or interest in the land granted. If it had been intended to be a recognition of the existence of the right of such owner to or in the land granted, the provision for compensation would have been unqualified, and the recognition clear and absolute."

American Dock & Imp. Co. v. Trustees, at p. 444.

(D) *A riparian owner is not entitled to compensation for the loss of the benefit of accretions where a grant is made to third persons.*

Stevens v. Paterson & Newark R. R. Co.,
34 N. J. L. 532;

American Dock & Improvement Co. v. Trustees, 39 N. J. Eq. 409.

Stevens v. Paterson, etc., R. R. Co., has been continually cited as upholding the absolute character of the state's title. Among the cases we may cite the following:

Hoboken v. Pennsylvania Railroad, 124 U. S. 656;

Hoboken v. Hoboken Land & Imp. Co., 36 N. J. L. 540;

American Dock & Imp. Co. v. Trustees of Public Schools, 39 N. J. Eq. 409;

Marcus Sayre v. Newark, 60 N. J. Eq. 368;

Simpson v. Morehead, 65 N. J. Eq. 629;

Philadelphia Brewing Co. v. McOwen, 76 N. J. L. 636;

Sooy Oyster Co. v. Gaskill, 71 N. J. Eq. 308;

Attorney-General v. Lehigh Valley R. R. Co., 78 N. J. Eq. 349.

(E) *If a grant may be made to a person other than the riparian owner without compensation to the latter, then on principle the state may make a riparian grant that shall have fixed and not ambulatory boundaries.*

Accepting as a correct premise the doctrine of *Stevens v. Paterson, etc., R. Co.*, *supra*, the above conclusion is inevitable. Mr. Justice Swayze in construing the grant involved in this case in *Dewey*

Land Co. v. Stevens, 83 N. J. Eq. 314, 317 (E. & A.), says:

“If the land was formerly fast land, and the title was lost by erosion, it became the property of the state, not merely as long as it remained under water, but, if the state made a riparian grant, absolutely. *Stevens v. Paterson and Newark Railroad Co.*, 34 N. J. Law, 532. Whatever right the former owners might have as against private persons upon the ocean receding, was of no avail against the state’s riparian grant. The title lost by erosion was then lost forever, unless it was regained by accretion, and the right of accretion was the compensation of the former owner for his loss.”

The last phrase of the above citation is used by Judge Haight in his opinion to completely destroy the major premise, and, in effect, to overrule the doctrine of *Stevens v. Paterson & Newark Railroad Co.*

Did Justice Swayze intend by the employment of this four-line phrase to overrule the leading case of *Stevens v. Paterson, etc., R. Co.*, and the other cases upon which he relied? Did he intend to defeat his major premise by the use of this phrase? Did he intend in this casual manner to reverse the settled law of the state upon which titles had been granted for fifty years? Such a construction is unthinkable. Is not the proper construction of this phrase as follows:

“Whatever right the former owners might have as against private persons upon the ocean receding was of no avail against the state’s riparian grant. The title lost by erosion was then lost forever, unless (*prior to the making of*

a riparian grant by the state) it was regained by accretion."

Judge Haight makes use of the opinion of Judge White in the same case as a justification for the emasculation of the Swayze opinion. Judge Haight, in his opinion, says:

"The case of *Stevens v. Paterson & Newark Railroad Co.*, cited by Mr. Justice Swayze, simply held that the State of New Jersey is the absolute owner of the land under all navigable waters, below the ordinary high water line within its limits, and can grant such land to anyone without making compensation to the owner of the shore, with the possible exception of the right to 'alluvium and dereliction,' pointed out in Judge White's opinion in *Dewey Land Company case*."

This is based upon a fundamental misconception of what was held in *Stevens v. Paterson and Newark R. R. Co.* It is true that Chief Justice Beasley in *Stevens v. Paterson, etc., R. Co.*, at p. 544, makes use of the following language cited by Judge White in his opinion, in 83 N. J. Eq., at p. 659:

"From these authorities, and many others which might be cited, it appears to me to be plain, that by rules of the ancient law, the owner of the land along the shore was entitled to no right as an incident of such ownership, except the contingent ones before referred to of alluvion and dereliction," and, again, "if such a right (to build a wharf out beyond the high water line without a riparian grant from the state) existed by force of the common law, as an incident of property, it is obvious that it could

not be destroyed or substantially impaired by the legislature without compensation."

It is conceded that a right to accretions exists in the riparian owner, but such right ends immediately when the state, in the exercise of its paramount right, makes a grant of the lands under the water of which it is the absolute owner. If the context to the language quoted from *Stevens v. Paterson, etc., R. Co.*, be read, it is apparent that the language there employed was used in support of the theory that the rights theretofore claimed by riparian owners to extend their lands by artificial means below the line of high water or to wharf out, were based upon a mere license revocable by the state, and that *if* such privilege were revocable it existed by grace and not of right. At any rate further along in the same case, after a consideration of all the elements involved, Chief Justice Beasley reaches the following conclusion:

"The steps which I have thus far taken have led me to this position: That all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, *has no peculiar rights in this public domain as an incident* of his estate, and that the privileges he possesses by local custom or by force of the Wharf Act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature."

Stevens v. Paterson, etc., R. Co., at p. 549.

(F) *While the state had a right to make a grant of the "shore" (the land between high and low water marks), it did not do so but prescribed by metes and bounds the fixed boundaries of its grant.*

The respondents contend that the riparian grant was ineffective as to lands above the present high water mark formed by accretions within its original bounds. The argument advanced below was that the interior boundary was ambulatory and shifted with each change of the high water mark. This argument was based upon the case of *Scrutton v. Brown*, 4 B. & C. 485, which passed upon a grant of lands between the high and low water mark, and not a grant of land below the high water mark described by definite metes and bounds as in this case. In the *Scrutton* case it was held that this constituted a movable freehold, and that the Crown by a grant of the seashore would convey not that which at the time of the grant is between the high and low water marks, but that which from time to time shall be between those two termini. The grant in the case *sub judice* was by fixed metes and bounds (see p. 3/ of this brief).

It will be observed that the above case is dispositive only of the question of what the grantor intended to convey by the language employed in the grant. It is not authority for the proposition that the Crown was powerless to convey lands under water by metes and bounds definitely fixed so as to exclude a riparian owner from a right to accretions, but even if it could be held to go that far the later New Jersey cases to the contrary are controlling.

(G) *The riparian owner's right to accretion, a permissive one—a tacit license from the state—is terminated upon the state making a riparian grant with fixed and definite boundaries. Therefore, the riparian grant to the appellant's predecessors in title is superior to the respondents' claim by accretions.*

Stevens v. Paterson & Newark R. R. Co.,
34 N. J. L. 522;

American Dock & Improvement Co. v. Trustees, 39 N. J. Eq. 409;

Dewey Land Co. v. Stevens, 83 N. J. Eq. 314.

The true theory is that the riparian owner's right to accretion is a permissive one—a license from the state; that when the state exercises its paramount right in the making of a grant of lands under water the license is terminated. Such a theory vindicates and makes safe the title of the state's grantee. The rejection of this theory would not only unsettle the title of the state's grantee, but would deprive him of lands which belonged to the state, and for which he had paid, for the benefit of the riparian owner who was held to be entitled to no compensation whatever in case the state makes a grant of the lands under water in front of such riparian owner's lands.

III.

TITLE BY ACCRETIONS.

Is the appellants title by accretions to the locus in quo superior to the respondents' title by accretions? This involves the question as to whether the equitable method of division of a segment of a circle is by radial lines at practically right angles to the shore line or by the protraction of the upland side lines.

It must be borne in mind that both the original line of high water and the present high water line are convex in contour, and that the new high water line is more than double the length of the original line.

The first question to be settled is the time when the rights of the respective parties accrue. This has been settled in New Jersey as follows:

“As between vendor and vendee the right to alluvion depends upon the condition of the land at the time of the transfer of the legal title.”

Ocean City Assn. v. Shriver, 64 N. J. L. 550, 551.

The title was in the common grantor, to wit: the Atlantic Beach Front Improvement Company, until November 9, 1899, when it was granted to Burkhard, Stevens' predecessor in title. (Exhibit D4, Record, p. 216).

The easterly ninety feet of plaintiff's lands were conveyed by the common grantor, the Atlantic Beach Front Improvement Company, to the States Avenue

Land Company, by deed dated May 24, 1900 (Ex. p. 17, Record, p. 203).

The question, therefore, presented is: What would have been an equitable method of division between Burkhard and the Atlantic Beach Front Improvement Company of lands formed by accretions since November 9, 1899? Would the Atlantic Beach Front Improvement Company have been entitled to all of the gains, while Burkhard would be restricted not only to his original ocean frontage, but to a shorter line? Because obviously the effect of protracting Burkhard's side lines would be to effect such a reduction, since his original shore line ran at an oblique angle.

In order to sustain the decree in this case it must be held against all authority that under such circumstance one co-terminus owner is entitled to all of the gain caused by the longer shore line, and the other to no part of such gain. Is there any way of equitably dividing a segment of a circle except by radial lines? The attempt to do otherwise, it seems to us, is equivalent to an attempt to square a circle.

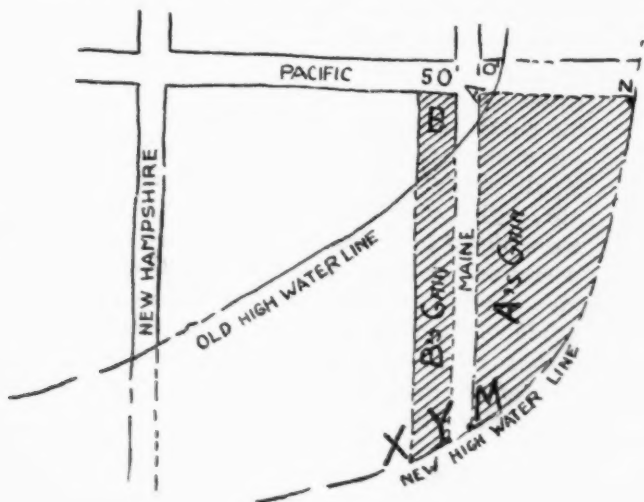
The difficulty with the opinion of Judge Haight is that he does not apply his method to the whole area of accretions, nor does he apply it to the rights of the parties as they accrued at the time of the conveyance from the common grantor, to wit, November 9, 1899. He conveniently moves his trouble further up the beach and leaves it there. He says:

"Whether the riparian proprietors who owned lands east of the plaintiff's lands should have the accretions divided among them on lines parallel with New Hampshire Avenue, or on lines parallel with Pacific and Oriental Avenues, it is not necessary to decide."

But there is a necessity to decide whether the

method adopted by Judge Haight when applied to the whole accreted territory would result in an equitable division. If it would not so result it is manifestly wrong.

The real question in controversy is: How should the longer high water mark be divided between Burkhard and the Atlantic Beach Front Improvement Company? The method suggested by Judge Haight ignores this factor and ignores a large part of the accreted territory lying to the east, and his method, if carried to its ultimate conclusion, would result in the owner holding the extreme easterly portion of the shore taking all of the gain by accretion within the boundaries of Pacific Avenue and Maine Avenue extended. Even though he owned but ten feet of ground he would become the owner between lines diverging at an angle of ninety degrees of a great tract of accreted land. This point may be illustrated by the following rough sketch:



The tract marked A is the result obtained by adopting the side line extension scheme. B, the adjoining lot owner, acquires a smaller water frontage on the new high water line (X-Y) than he had on the old; while A, owning only ten feet of land, acquires the extensive frontage indicated (M-N). This is the result of side line extension—a mere legal lottery.

General Principles of Accretions.

Concerning the general principles of division Professor Farnham has the following to say:

“In *Deerfield v. Arms*, 17 Pick. 41, the Court says two objects are to be kept in view in the division of a water front; one is that the parties shall have an equal share in proportion to their lands of the area of newly formed land, regarding it as land useful to the purpose of cultivation or otherwise in which the value will be in proportion to the quantity; the other is to secure to each an access to the water and an equal share of the river line in proportion to his share on the original line of water, regarding such water line in many situations as principally useful for forming landing places, docks, etc., with a view to benefits of navigation. *The main object to be kept in view in any division of accretions or the bed of water is that the division shall be equitable, and that it shall be proportionable so far as to give each shore owner a share of the land to be divided and his due portion of the exterior water line.*”

3 Farnham on Waters, p. 2474.

“The title by accretions or right of accession in relation to land is a sort of legislative dona-

tion of what would without such donation be public property * * *. This legal title refers, it is true, to one of the lines of the riparian proprietor's original title as a measure of his right of accession in the alluvial accretions of soil. But the line so referred to is not the side lines of the original conveyance or grant. It is its front line, and the front line alone. The course of sides lines is of no consequence in the division of alluvion formed subsequently to the conveyance or grant. The line of such division must be drawn in such a manner as that each of the contiguous riparian proprietors *shall have such a proportion of alluvial soil as to the total extent of his front line bears to the total quantity of the alluvial soil to be divided.*"

Delord v. New Orleans, 11 La. Ann. 699.
(The italics are our own.)

The principle universally recognized by Courts that are called upon to establish rules for division of riparian lands, is that the upland owners are entitled to take new front in proportion to their ownership of the old frontage. In those cases where right angles were drawn to determine a division it will be found that the shore was straight, and that a proportionate division of the new shore line was thereby effected. Where the shore does not form a straight line, but is convex or concave, and the protraction of the side lines being impracticable, the new water front is divided proportionately.

Wonson v. Wonson, 14 Allen, 71;

Batchelder v. Keniston, 51 N. H. 496;

Kehr v. Snyder, 114 Ill. 313;

Deerfield v. Arms, 17 Pick. 45;

Johnston v. Jones, 66 U. S. 1;

O'Donnell v. Kelsey, 10 N. Y. 412;
Nauman v. Burch, 91 Ill. App. 48;
Berry v. Hoogendoorn, 133 Iowa, 437, 108
N. W. 923;
Newell v. Leathers, 50 La. Ann. 162, 23 So.
243;
Hathaway v. Milwaukee, 132 Wis. 249, 9
L. R. A. (N. S.) 778; 111 N. W. 570, 112
N. W. 455;
Groner v. Foster, 94 Va. 650, 27 S. E. 493;
Stock v. Neriwhether, 57 Pac. 438 (Kan.
S. C. 1916);
Reed v. Moore, 151 S. W. 1005 (S. C. Ark.
1912);
Malone v. Moves, 145 S. W. 193 (S. C. Ark.
1912).

With regard to lakes, the same principle controls. *Calkines v. Hart* (N. Y. Ct. of App. 1916), 113 N. E. 785; *L. R. A.* 1917 B. 783, and the cases set forth in the foot note to the *L. R. A.* reference noted above.

The cases on the subject have been collected and are set forth in two comprehensive editorial notes found in 21 *L. R. A.* 776, and 25 *L. R. A.* (N. S.) 257.

Judge White, in his opinion in *Dewey Land Co. v. Stevens*, adopts the apportionment made by the riparian commission, which covers the entire frontage of lands formerly owned by the common grantor, as equitable. Indeed, it requires but a single glance at the map (Exhibit D8) to satisfy one of the correctness of this view. It is inevitable from the contour of the shore line that the line of the riparian grants and the lines of accretions should be coincident. Judge White says in his opinion:

“Of course, changes are constantly taking place in the high water lines and in the direction

thereof. A shore which one year was concave in its contour may a year later have become convex. The resultant effect upon lines projected at right angles to it at various points during the process of transition to determine boundaries between neighboring accretion gains, is hopelessly confusing and the consequent state of uncertainty in titles most injurious. A practical working system is necessary for the good of all, *and where such a system has been established its fairness must be more than questioned, in fact, must be clearly overthrown, before the courts will feel justified in intervening. Such a working system seems to have been adopted by the riparian commission under its appointment by, and within the discretion vested in it by the sovereign power of the state.* Under this working system it takes the line of general contour of the shore in the vicinity, and, disregarding local or trivial or temporary indentations or excrescences, runs its division lines at right angles, or as nearly at right angles as is equitable under the circumstances, to such general line of contour at the time it takes up the subject of making riparian grants in such vicinity, and then, subsequently adheres as nearly as possible, or as is equitable, to the general division lines thus established, without regard to the fact that subsequent shifting of angles and locations of the high water line may have brought about a condition which, if it had existed originally, would have produced different results in the directions of such division lines. *Not only do I fail to see any unfairness in this working system, but, on the contrary, I cannot see how any other could be practical.*

Where, therefore, as here, the riparian commission has made a grant, the bounding division or side lines of which run at right angles, if that is equitable, or if not, at such angle as, under the circumstances, is equitable, to the general contour of the shore at the time of the plotting or surveying of the vicinity for riparian granting, such lines will, I think, be upheld by the courts as a *practical and legal ascertainment* of the boundary lines of subsequent accretion gains to the adjacent high land should such gains occur. *Gould Wat. Secs.* 162, 163. This is so, I take it, not because the state, through the riparian grant, has vested in its grantee a title to land under water which survives when the land by accretions to the adjacent high land has ceased to be under water, but because the riparian grant, as here made, is by its very authority confined to the land under water in front of the grantees adjacent high land, viz., to the land which would become his by accretion to such high land should natural accretions occur, and, consequently, the division boundary lines defined in the grant are an authoritative ascertainment by the granting tribunal of the boundary lines of these accretion gains should they occur. *Gould Wat. Sec. 162."*

Dewey Land Co. v. Stevens, 83 N. J. Eq. 656.

Plaintiff in the argument below cited a number of Massachusetts cases in support of his contention that where the owner had previously laid out property with reference to the lines of a street it was a sufficient reason for extending the lines of the lots on either side of the street parallel thereto, and

most of these cases are cited by Judge Haight in his opinion. Among them are the following:

Valentine v. Piper, 22 Pick. 88;

Piper v. Richardson, 9 Metc. 155;

Drake v. Curtis, 9 Cush. 446;

Commonwealth v. City of Roxbury, 9 Grey, 523;

Gerish v. Gary, 120 Mass. 132;

Adams v. Wharf Co., 76 Mass. 521;

Attorney-General v. Boston Wharf Co., 78 Mass. 553.

Counsel for the plaintiff have misconceived the force and effect of the Massachusetts decisions which they cite. These cases *do not* hold that the side lines of upland lots and of streets will be extended to the extreme line of riparian ownership. On the contrary they uphold the negative of this proposition. They do hold that where co-terminus shore owners agree on the division of their subaqueous lands the Courts will uphold their agreement, and further that where these lands have been built on and the artificial boundaries acquiesced in for long periods of time, an agreement of division will be implied therefrom. Beyond this they do not go.

By an ordinance passed in 1641, littoral proprietors were entitled to hold to the low water mark. The foreshore, known in Massachusetts as flats, has ever since been regarded as vested in the upland owners, although flooded by the tides. The problem of drawing the division lines between owners of these flats would have been conveniently settled by protracting the sides lines of upland ownership. But the courts early refused to apply this rule of convenience, declaring it inequitable, and substituted the rule of division by right angles where the

shore was straight, and proportionate division on the line of low water where the shore was curved.

Thus it was held in *Rust v. Boston Mills Corp.*, 6 Pick. 169, that the direction of the side lines of the upland would not govern that of the side lines of the flats, but that the *locus in quo* being situate on a cove, the division must be proportionate. This view was affirmed and followed in *Piper v. Richardson*, 9 Met. 155, 158,—the Court declaring “the side lines of the upland have no influence in deciding the direction of the exterior side lines of the flats,” in *Drake v. Curtis*, 9 Cush. 446; *Curtis v. Francis*, 9 Cush. 447; *Stone v. Boston Steel & Iron Co.*, 14 Allen, 130, and many others.

The intention of the ordinance was, “if practicable, to give to every proprietor the flats in front of his upland of equal width with his lot at low water mark.” Wilde, J., in *Gray v. Deluce*, 5 Cush. 12. Therefore, where there was no cove or headland, a straight line is to be drawn according to the general course of the shore at high water and the side lines of the lots extended at right angles with the shore line. *Sparhawk v. Bullard*, 1 Metc. 106; *Porter v. Sullivan*, 7 Gray, 443; *Deerfield v. Allen*, 17 Pick. 45, 46; *Knight v. Wilder*, 2 Cush. 210.

Around the headline, it was held, lines dividing the flats must diverge towards low water mark. *Gray v. Deluce*, 5 Cush. 12, 13; *Porter v. Sullivan*, *supra*.

The plaintiff has placed considerable emphasis on *Valentine v. Piper*, 22 Pick. 85. An examination of that case shows that the dispute was not over flats but over uplands, the Court holding that proof of the ownership of the upland carried with it a presumption of ownership of the flats. Regarding the side lines of the flats, the Court held that where those lines had been established by awards or fixed by

agreement of the parties, these boundaries would be recognized by the Court. In this case the northerly side line had become established by the erection of a wharf extending into the water. To this wharf Summer Street had later been run. The wharf had finally fallen to pieces, but its location remained fixed by the line of the street. The Court held that the southerly line of the flats should conform to the established boundary on the north, referring to the street. Counsel have deduced therefrom that the Court regarded Summer Street as in itself determining the boundary. This was not the case, the line of Summer Street being used to fix the riparian division lines solely because it marked the line to the old wharf, which extending to low water mark had served to mark the division of ownership of the flats.

Judge Haight does not attempt to enunciate any rule for the equitable division of the accreted territory, but bases his decision upon a presumed agreement of the parties or their predecessors in the title, and makes this the decisive factor.

IV.

Whether by reason of certain conveyances of upland having been made with reference to New Hampshire Avenue, thereby that avenue was constituted a fixed boundary and impassable barrier separating as between co-terminous owners of the upland the accreted lands thereafter formed.

In support of such presumed agreement Judge Haight cites the following:

A. New Hampshire Avenue is delineated on the "1854" map as extending in a straight line and at right angles to Pacific Avenue to the low water mark of the Atlantic Ocean, further than it extends at the present time.

B. Numerous conveyances have been made and mortgages executed upon the properties where the properties have been described by lines running at right angles to and parallel with the street system.

From A and B he finds that "It is manifest that if it should be held that the respective riparian proprietors are entitled to accretions in accordance * * * with the lines of their riparian grants * * * a very great confusion in titles would result and the door be thrown open, in the straightening out of lines, to the making of exorbitant demands, etc."

Before considering the reasoning of Judge Haight particular attention should be called to the following facts: That as to all lands lying eastward of New Hampshire Avenue and owned by the plaintiff's predecessor in the title, except for a strip of 90 feet east of and parallel with New Hampshire Avenue, riparian grants along radial lines were made by the State of New Jersey, the first of which was dated December 29, 1900, and made to John McPherson, and two of which were made on October 21, 1901, to Charles G. Henderson, et als. (See Map Exhibit D8.)

It will be recalled that the title of the plaintiff as to a strip 100 feet in width and beginning 90 feet east of New Hampshire Avenue came from the Atlantic Beach Front Improvement Company, who conveyed to Henderson, Moss and Hancock by deed dated November 1, 1899 (Ex. P16, Record, p. 202).

Henderson, et als., conveyed to Conrow by deed dated April 14, 1903 (Ex. P18, Record, p. 203). Conrow conveyed to the States Avenue Land Company by deed dated April 14, 1903 (Ex. P19, Record, p. 204). States Avenue Land Company conveyed to Dewey Land Co. by deed dated December 19, 1904 (Ex. P20, Record, p. 205). It will, therefore, be seen that the plaintiff's predecessors in the title, to wit, Henderson and others, not only acquiesced in the method of radial lines of the riparian grants, but actually received conveyances thereof from the State of New Jersey prior to conveying their title to the plaintiff.

Not only did the plaintiff's predecessors in the title recognize and accept radial boundary lines for the riparian grants, but the plaintiff himself specifically recognized the principle of radial lines as applied to accretions by the following formal deeds:

Deed, Dewey Land Company to Louis E. Stern, dated July 17, 1912 (Ex. P26, Record, p. 209), the description of which reads as follows:

"Beginning at the intersection of the south line of Dewey Place with the east line of New Hampshire Avenue, and extending thence east along the south line of Dewey Place 190 feet; thence southward parallel with New Hampshire Avenue 350 feet, more or less, to high water line of Atlantic Ocean as it existed on April 14, 1903; thence east at right angles to high water line of the Atlantic Ocean as it existed in 1856, 770 feet, more or less, to said high water line as it then existed; thence southwest along the high water line of the Atlantic Ocean as it existed in 1856 to point in said high water line where the same would be intersected by the east line of New Hampshire Avenue extended;

thence north in the east line of New Hampshire Avenue, extended, 1120 feet, more or less, to beginning" (Appeal Record, p. 67).

Louis E. Stern conveyed to Dewey Land Co. by deed dated July 17, 1912 (Ex. P26, Record, p. 211), the property last above referred to by a description identical with that contained in the deed from the Dewey Land Company to himself, and the Dewey Land Co. conveyed to Nirdlinger by deed dated Feb. 4, 1914 (Ex. P28, Record, p. 210) by a description identical with that contained in the last mentioned deed.

Nirdlinger claims title to the locus in quo by deeds dividing the accreted territory by radial lines.

It is at once apparant that the deed from Stern to Nirdlinger, last above referred to, included lands formed by accretion between 1903 and the date of the deed (see Exhibit D8), and that thereby there was a clear recognition by Nirdlinger of the principle of dividing the accreted territory by lines formed at right angles to the shore line. It is true that he adopted the shore line of 1856 as the base of his right angle. While this line cannot be accurately defined at the present time, every known high water line, as well as the low water line of 1852, was convex in contour.

We then have the plaintiff himself by a formal deed made directly to himself recognizing the principle of radial lines of division as to a part of the *locus in quo*. We also have his predecessors in the title, namely, Henderson, Moss and Hancock, accepting riparian grants with radial lines of division, from the State of New Jersey affecting another part of the *locus in quo*.

With whom was the presumed agreement made?

Down to 1899 the lands on both sides of New Hampshire Avenue were in common ownership so far as the beach front was concerned. There was no one with whom any agreement could have been made. It was impossible for the holder of the common title to "agree" with himself.

Cases cited both in the opinion of Judge Haight and in the brief of counsel refer to agreements between *co-terminus owners*, and relate to lands *below the high water mark*.

Obviously the adoption of the boundary line above the high water mark would be no evidence of an agreement as to the division of lands below the high water mark, or of accretions should they occur. There was clearly, therefore, no agreement prior to 1899 as to the division of accretions, *because there was no one with whom such an agreement could be made*.

The record in this case discloses every conveyance made to the high water mark and covering all of the lands acquired by John McClees. *As none of the several hundred grantees who accepted deeds running at right angles to or parallel with the street system were riparian owners it makes no difference whatever to their titles how the shore line originally ran, or how the division lines of accretions formed subsequently to their acquisition of title shall go.* McClees could convey lands which he owned *inside of the high water mark* by any angles that he *saw fit*. It was his land until 1899 and extended to the high water line wherever it might be. The only conveyances made subsequent to that time are accounted for in this proceeding.

How it is "manifest * * * that a very great confusion in titles would result" to several hundred other grantees is not apparent. Their title papers were not before the Court; no one of these parties was before the Court, and it does not appear by any proof that their titles would be in any way adversely affected. As the land was in a common grantor until 1899, and their conveyances must have been made prior to that time, they received their titles from the only man who had any claim thereto, viz., John McClees, regardless of how future accretions should be divided. Accretions had formed when they took their deeds, and there could be no adverse claimant because of the fact that McClees owned all of the land to the high water mark.

By way of illustration let us assume that McClees continued to own all of the lands appearing upon Exhibit D8 up to the high water mark of 1907, and that he conveyed them to sundry grantees, reserving to himself a belt of 15 feet extending from the high water mark landward. There would be nothing whatever to prevent his making conveyances landward of the fifteen foot strip at right angles to or parallel with the street system, nor would the rights of such grantees be in any way affected if subsequently to 1907 accretions formed out to and corresponding with the riparian commissioners' exterior line as shown upon Exhibit D8. Obviously all of such newly accreted lands would belong to McClees, and obviously all of the lands theretofore granted by him parallel with or at right angles to the street system would be the property of his grantees, and no confusion to the title of his grantees would result from the last formed accretions.

It seems passing strange that if the confusion in their titles (not before the Court) was so "manifest"

that it would not have been apparent to Judge White who, as is well known, lives at Atlantic City, and who endorsed the plotting of the vicinity for riparian grants as a practical and legal ascertainment of the boundary lines of subsequent accretion gains to the adjacent high lands, should such gains occur. It is scarcely conceivable that Judge White, a resident of Atlantic City, and the owner of valuable property interests along the beach front, should have been so insensible to the danger as to promulgate a rule, the effect of which would be to throw into confusion hundreds of titles almost at his very door.

ON THE RIGHT TO CROSS THE LINE OF NEW HAMPSHIRE AVENUE:

It must be remembered that in New Jersey abutting property owners own the fee to the center of the street. *Ocean City v. Shriver*, 64 N. J. L. 554; *Salter v. Jonas*, 39 N. J. L. 469. This fee is subject to the easement of the public, but the fee is in the abutting owners.

It was absolutely essential that the line of accretions for lands formerly owned by McClees should cross the streets as laid out in the Atlantic City street system. At one time the high water mark was practically at the corner of Vermont and Pacific Avenues (see Judge Haight's opinion, p. 331, lines 30-34). Since that time lands have formed at least 1000 feet south of Pacific Avenue, at least 800 feet east of Vermont, which made necessary the crossing of the following avenues: Pacific, Vermont, New Hampshire, and Maine Avenues.

Upon what principle of either law or logic can it be said that the owner of the lands at the high water

mark at the time when it intersected Vermont and Pacific Avenues would be barred from accretions crossing the street system? To whom would such accretions belong? If to the owner of the shore line then it would be absolutely necessary that his rights should extend across the street system. How would the public be injured? The public easement in the street would continue regardless of the abutting property owner's ownership of the fee. Since the public would not be injured, and since there could be no rival claimants where the shore line was in common ownership, to deny the riparian owner the right of crossing the street system would be a palpable absurdity. If the streets were originally dedicated to the high water mark the dedication would continue, and would carry the dedicated street to the new high water mark formed by accretions.

Judge Haight relied upon the case of *Stockton v. Browning*, 18 N. J. Eq. 309, which he considered so nearly analogous as to make the case an important authority. *Stockton v. Browning* was a case where an old division line between lands lying on tide-water had for more than forty years been treated by the owners as extending over the shore or the lands between high and low water, and regarded the same as the division line of their right upon the shore. In that case it was held that the recognition of this line *below* the high water line fixed the rights of the parties. It is not authority, however, for the proposition that the recognition of the line above the high water mark, to wit, New Hampshire Avenue (in this case) fixes the line for the division of accretions.

In the *Browning* case the division line was created by deed of 1695. By conveyance made in 1769 the division line was fixed and was recited to extend to

low water mark. A similar deed in 1843 conveyed the lands to *low water mark*. It was originally supposed in New Jersey that the title of the riparian owner extended to low water mark. As there had been this recognition of a line of division for a long period the Court held that the parties were bound by the recognized line when accretions occurred.

In the Browning case, however, there were two elements not present in the case *sub judice*: (1) That the agreement as to the division line related to lands below the high water mark. (2) There were adjoining owners (so that an agreement could be made). In the case *sub judice* New Hampshire Avenue is above the high water line and the easement of New Hampshire Avenue was not intended as a line of division between separate owners but the lands on both sides of the street were in common ownership. Will the Court upon such a slender foundation assume and create an agreement that the mere laying out of this public street through lands in common ownership at the time was acquiesced in by the common owner as the means of unnecessarily depriving him of his right of accretions when they should occur? Can it go further than to say that the laying out of the public streets was an acquiescence by the owner of the common title in the public easement or use of such street? Certainly the public rights demanded nothing more than this, and to exact more of the owner would be to deprive him of his natural rights without benefit to any one else in such a situation. *If such owner was not entitled to the accretions there was no one else in existence who could lawfully claim the same.*

A number of cases have been cited by the plaintiff in support of the proposition that the defendant has no right to cross the line of New Hampshire

Avenue. Among them is the case of *Banks v. Ogden*, 2 Wall. 57. An examination of these cases discloses the fact that the streets referred to were streets intervening and bordering the high water mark, and not streets running at right angles thereto, as does New Hampshire Avenue. When properly considered they simply hold the well-known doctrine that if there be any intervening lands between that of the claimant and the high water mark, the claimant can take nothing because he is not a riparian owner. Extended comment or discussion is unnecessary.

Appellant's reasons for the reversal of the decree of the District Court may be summarized as follows:

(a) Because this matter is *res adjudicata* by the New Jersey suit. The reasons in support of the above are summarized at pages 7 and 8 of this brief under the title of "*Res Judicata*."

(b) The appellant's riparian grant conveys an absolute title. In support thereof, See *Dewey Land Co. v. Stevens*, 83 N. J. Eq. 314 and 656; *Stevens v. The Paterson Railroad*, 34 N. J. L. 532, and other cases cited under the caption of "On the Effect of the Riparian Grant" (pages 31 and 32).

(c) The appellant is entitled to the *locus in quo* by reason of accretions. In support thereof the following propositions are advanced:

1. The basis of division is the respective rights of Burkhard (appellant's predecessor in title) as of November, 1899, and the Atlantic Beach Front Improvement Company.

2. The method of division should be such that the contiguous riparian proprietors, viz., Burkhard and the Atlantic Beach Front Improvement Company, shall have such a proportion of the alluvial soil as the total extent of their respective front lines bear to the total quantity of the alluvial soil to be divided, and such line of division is referable not to the side lines of the original conveyance but to the front line alone.

3. Because the mere protraction of the side lines would result in an inequitable apportionment, in that all of the gain in the shore line would go to the most easterly proprietor instead of being equitably divided.

4. Because the assumed agreement that New Hampshire Avenue should constitute a boundary line between co-terminus owners has no basis in fact, the lands on both sides of the street being in common ownership up to the time of the conveyance to Burkhard, and there being no co-terminus owners between whom an agreement could be made.

5. Because all of the lands east of *Vermont Avenue* south of *Pacific Avenue* have been formed by accretions and have crossed several streets, and an attempt to limit the riparian owner so that he could not cross the line of any public street would be to exclude from ownership by accretion all lands lying south of *Pacific Avenue* and east of *Vermont Avenue*, and such a ruling would unquestionably unsettle hundreds of titles.

6. Because plaintiff and plaintiff's predecessors in the title acquiesced in the division of a part of

the *locus in quo* along radial lines, both as to riparian grants and accretions. See riparian grant, State of New Jersey to John McPherson, and State of New Jersey to Charles G. Hendereson (Map, Exhibit D8) and deed, Dewey Land Co. to Stern (Exhibit P24; Appeal Rec. p. 67) and Stern to Nirdlinger (Exhibit P26; Appeal Rec. p. 68).

In conclusion, it is respectfully submitted that the decree should be reversed for the reasons stated in this brief.

HARVEY F. CARR,
*Attorney for and of Counsel
with Petitioner.*

EXCERPTS FROM AN ACT ENTITLED "AN
ACT TO COMPEL THE DETERMINATION
OF CLAIMS TO REAL ESTATE IN CER-
TAIN CASES, AND TO QUIET THE TITLE
TO THE SAME."

4 Compiled Statutes of New Jersey, page 5399.

"1. Suit to quiet title by person in possession; persons presumed to be in possession of wild lands, etc. That when any person is in peaceable possession of lands in this State, claiming to own the same and his title thereto or to any part thereof is denied or disputed, or any other person claims or is claimed to own the same or any part thereof, or any interest therein, or to hold any lien or incumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or incumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancery to settle the title of said lands, and to clear up all doubts and disputes concerning the same; the bill of complaint in such suit shall describe the lands with certainty, and shall name the person who claims, or is claimed or reputed to have such title or interest in or incumbrance on said lands, and shall call upon such person to set forth and specify his title, claim or incumbrance, and how and by what instrument the same is derived or created; and whenever any lands within this State shall not, by reason of their extent or by reason of such lands being wild or wood or waste or unclosed or unimproved lands, be in the actual peaceable possession of the owner or person claiming to own the same, the owner or per-

son claiming to own the same in fee under a deed or other instrument, duly recorded within this State, who shall have paid the taxes upon such lands and to whom or to whose grantors the taxes upon such lands shall have been assessed for five consecutive years immediately prior to the commencement of suit, shall be presumed to be in peaceable possession of such lands within the meaning of this Act; provided, no other person be in possession thereof; and it shall be lawful for such person so presumed to be in possession to bring and maintain a suit in chancery to settle the title of said lands and to clear up all doubts and disputes concerning the same, and such person so presumed to be in possession shall be entitled to all the benefits of and subject to all the provisions of this Act. (Rev. 1877, p. 1189, as amended P. L. 1901, p. 587.)"

"4. Answer of defendant claiming any estate; specification of title, etc. That if any defendant shall answer claiming any estate, or interest in, or incumbrance on said lands or any part thereof, he shall in such answer specify and set forth the estate, interest or incumbrance so claimed, and if not claimed in or upon the whole of said lands, he shall specify and describe the part in or upon which the same is claimed, and shall set out the manner in which, and the sources through which such title or incumbrance is claimed to be derived. (Rev. 1877, p. 1190.)"

"5. Issue at law may be directed on application of either party. That upon application of either party, an issue at law shall be directed to try the validity of such claim, or to settle the facts, or any specified portion of the

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facts upon which the same depends, and the Court of Chancery shall be bound by the result of such issue, but may, for sufficient reasons, order a new trial thereof, according to the practice in such cases; and when such issue is not requested, or as to the facts for which the same is not requested, the Court of Chancery shall proceed to inquire into and determine such claims, interest and estate, according to the course and practice of that court; and shall, upon the finding of such issue, or upon such inquiry and determination, finally settle and adjudge whether the defendant has any estate, interest or right in, or incumbrance upon said lands, or any part thereof, and what such interest, estate, right or incumbrance is, and in or upon what part of said lands the same exists. (Rec. 1877, p. 1190.)"

"6. Decree to settle rights of all parties and to be conclusive. That the final determination and decree in such suit, shall fix and settle the rights of the parties in said lands, and the same shall be binding and conclusive on all parties to the suit; but if any defendant to such suit, shall, either at the time of the decree *pro confesso* against him, or at the final decree, be an infant or *non compos mentis*, such party, his heirs or assigns, at any time within two years after the termination of such disability, may appear in said suit, and apply for a rehearing, and thereupon such decree shall be opened as against such party, and the cause may proceed as if no decree had been made in the same against him. (Rev. 1877, p. 1190.)"

EXCERPT FROM RECORD IN DEWEY LAND
CO. V. STEVENS.

IN CHANCERY OF NEW JERSEY.

Between	}	On Bill, etc.
DEWEY LAND COMPANY, <i>et al.</i> ,		
Complainants,		
and		
HENRY E. STEVENS, JR., <i>et al.</i> ,		
Defendants.		

TESTIMONY.

Transcript of testimony taken in the above-entitled cause, before HON. EDWIN ROBERT WALKER, Vice-Chancellor, at the Camden County Court House, on the second day of February, nineteen hundred and twelve, at eleven o'clock A. M.

APPEARANCES—GEORGE A. BOURGEOIS, Esq., for the complainants; HARVEY F. CARR, Esq., for the defendants.

Mr. Bourgeois: Mr. Carr is willing that the bill of complaint shall be amended, as follows, so that the bill will read:

After the words "bounded and described as follows," at the end of the first paragraph and before the word "beginning," interline the following:

"Beginning at a point in the easterly line of New Hampshire Avenue, 240 feet southwesterly from Pacific Avenue, said point being the southeast corner of New Hampshire Avenue and Dewey Place; thence extending (1) eastwardly parallel with Pacific Avenue and along the south line of Dewey Place, 190 feet; thence southwardly parallel with New Hampshire Avenue to the high water-line of the Atlantic Ocean as it existed in 1852; thence (3) southwesterly along the high water-line of the Atlantic Ocean as it existed in 1852 to the easterly line of New Hampshire Avenue, extended; thence (4) northwardly along said line of New Hampshire Avenue to the place of beginning; conveyed to complainants by various deeds of conveyance."

Strike out the two paragraphs after the words in the first paragraph on the second page of said bill, which reads as follows: "In Book 313 of Deeds, page 363"—the part stricken out beginning as follows: "and that by reason of the 'as' " and ending "more or less to the place of beginning." All on page 2 of said bill.

Mr. Carr: That will make necessary an amendment to our answer, because a greater portion of the lands are now claimed by the complainants than were claimed in the original bill, and we want to make our answer cover the increased territory now claimed by the complainants; and I also want to add to our claim of title, which is based upon a riparian grant, a claim by accretions, as well as the riparian title.

Mr. Bourgeois: There is no objection to that. We will make the formal amendments later.

Mr. Bourgeois opens the case to the Court.

Mr. Bourgeois: I want first to offer in evidence a certified copy of a map of dedication of Atlantic City, and ask that it be marked Exhibit C1; this is a reproduction of it.

OPINION OF VICE-CHANCELLOR WALKER,
DEWEY LAND CO. V. STEVENS.

Opinion of Vice-Chancellor Walker in Dewey Land Company against Stevens, pages 108, 109, 110, 111.

IN CHANCERY OF NEW JERSEY.

Between	}	On Bill, etc.
DEWEY LAND COMPANY, <i>et als.</i> ,		
<i>Complainants,</i>		
and		
HENRY E. STEVENS, JR., <i>et al</i> ,	}	
<i>Defendants.</i>		

MEMORANDUM.

On final hearing on pleading and proofs.

MR. ROBERT H. INGERSOLL and MR. GEORGE A. BOURGEOIS, for complainants.

MESSRS. WILSON AND CARR, for defendants.

WALKER, C.

The bill in this cause is one to quiet title. The complainants acquired a lot of land in Atlantic City fronting upon the ocean, by deed dated December 19th, 1904. The southerly line of the lot bounded upon high-water line of the Atlantic Ocean.

The allegations of the complainants are, that by reason of accretions in front of their tract by alluvial deposits, the high-water line has been projected out into the ocean a considerable distance, and that, by the law of this State they are entitled to the land this made oceanward of the original high-water line. As a legal proposition this is correct. *Ocean City Association v. Schriver*, 64 N. J. L. (35 Vr.) 550. But, in this case title to part of the land thus made is claimed by the defendants in virtue of a riparian grant by the State, made June 28th, 1900, which antedates the complainant's conveyance.

New Hampshire Avenue in Atlantic City runs nearly north and south. On this avenue, on opposite sides and opposite to each other, are the lands of the complainants and defendants, those of the complainants on the easterly and those of the defendants on the westerly side. At the time of the riparian grant to the defendants' predecessors in title, June 28th, 1900, high-water mark in the Atlantic Ocean cut across New Hampshire Avenue and the adjacent lands, on both sides of the avenue, from northeast to southwest, which presented a shore front line in the Bartletts (predecessors in title of defendants) which passed southwestwardly instead of nearly westwardly, and which, extended from the southeasterly corner at right angles from the high-water line of May, 1900, as established by the riparian commissioners, ran obliquely to the southeast across the line of the complainant's premises, extended rectangularly in a southerly direc-

tion. This was the situation when the riparian commissioners made to the Bartletts the riparian grant, which extends out into the ocean, to an exterior line established by themselves.

Alluvial deposits have been made all along the ocean at the point in dispute, and have made fast land in front of the complainants' lot far oceanward of the high-water line to which their conveyance runs by metes and bounds, and which fast land is well within a large portion of the defendants' riparian grant, also now largely fast land by reason of accretions. That is to say, their lines now cross each other on the same fast land.

It should be remarked that a portion of the northeasterly line of the defendants' riparian grant crosses, and includes within it, a portion of the land conveyed by metes and bounds to the complainants by their deed above mentioned. This occurs by reason of the fact that when the riparian grant was made in 1900, that part of the land granted to the Bartletts, and which was within the lines of the complainants' description as just mentioned, was under water and therefore was the proper subject of a riparian grant. This was in 1900, but in 1904, when the complainants received their deed running to high-water line as a monument, the line had then extended a considerable distance eastward, and the westerly line of complainants' deed therefore intersects and runs over for a considerable distance the northeasterly line of the defendants' grant.

The jurisdictional facts of peaceable possession in complainants and no suit pending, are present.

The defendants admit that the complainants' claim of ownership of the lands made by accretions is disputed, and they deny that the complainants have any title thereto within the lines of the tract acquired from the Bartletts by deed dated April 25th,

1905 (which includes the riparian grant), and that such portion of the lands so conveyed as laid below the high-water line of the Atlantic Ocean as that line existed in May, 1900, was conveyed by the State to the Bartletts, under whom they claim, in the riparian grant of June 28th, 1900. In this position they are correct in point of fact, and are also entitled to prevail as matter of law.

As was held in *Sooy Oyster Co. v. Gaskill*, 69 Atl. Rep. 1084, on the question of the force and effect of a riparian grant:

“Where plaintiff shows ownership under an absolute grant executed by the riparian commissioners, the complainant must be regarded as the undisputed owner of the *locus in quo*, for the grant is from the sovereign power, and is protected from collateral attack, except through false suggestions appearing on the fact of the grant; and the fact that the grant is void,—cannot be shown by affidavits, and the validity of complainant’s grant on the ground stated can only be determined by a direct proceeding for that purpose brought in the name of the Attorney-General.”

The case of *Attorney-General v. Morris & Cummings Dredge Co.*, 64 N. J. Eq. (19 Dick.) 555; affirmed, 69 N. J. Eq. (3 Robb.) 829, is an illustration of such a proceeding as Vice-Chancellor Leaming mentions in *Sooy Oyster Co. v. Gaskill*. See also *Attorney-General v. Sooy Oyster Co.*, 78 N. J. L. (49 Vr.) 394, at pp. 407-8 & 9.

The complainants’ bill must be dismissed, with costs.

EXCERPTS FROM RIPARIAN STATUTES.

RIPARIAN RIGHTS.

Excerpts from the Riparian Rights, Statutes New Jersey, 4 Compiled Statutes of New Jersey, page 4382.

15. "Grant of lands under water, Sec. 8. That if any person or persons, corporation or corporations, or associations, shall desire to obtain a grant for lands under water which have not been improved, and are not authorized to be improved, under any grant or license protected by the provisions of this act, it shall be lawful for any two of the said commissioners concurring, together with the governor and attorney-general of the state, upon application to them, to designate what lands under water for which a grant is desired lie within the exterior lines, and to fix such price, reasonable compensation, or annual rentals for so much of said lands as lie below high water mark, as are to be included in the grant or lease for which such application shall be made, and to certify the boundaries, and the price, compensation or annual rentals to be paid for the same, under their hands, which shall be filed in the office of the secretary of state; and upon the payment of such price or compensation or annual rentals, or securing the same to be paid to the treasurer of this state, by such applicant, it shall be lawful for such applicant to apply to the commissioners for a conveyance, assuring to the grantee, his or her heirs and assigns, if to an individual, or to its successors and assigns, if to a corporation, the land under water so described in said certificate; and the said commissioners shall, in the name of the state, and under the great seal of the state, grant the

said lands in manner last aforesaid, and said conveyance shall be subscribed by the governor and attested by the attorney-general and secretary of state, and shall be prepared under the direction of the attorney-general, to whom the grantee shall pay the expense of such preparation, and upon the delivery of such conveyance, the grantee may reclaim, improve and appropriate to his and their own use, the lands contained and described in the said certificate; subject, however, to the regulations and provisions of the first and second sections of this act, and such lands shall thereupon vest in said applicant; provided, that no grant or license shall be granted to any other than a riparian proprietor, until six calendar months after the riparian proprietors shall have been personally notified in writing by the applicant for such grant or license, and shall have neglected to apply for the grant or license, and neglected to pay, or secured to be paid, the price that said commission shall have fixed; the notice in the case of a minor shall be given to the guardian, and in case of a corporation to any officer doing the duties incumbent upon president, secretary, treasurer or director, and in case of a non-resident, the notice may be by publication for four weeks successively in a daily newspaper published in Hudson County, and in a daily newspaper published in New York City (Rev. 1877, p. 984)."

20. "Grant to person other than riparian owner; rights of riparian owner; how extinguished; appeal. Sec. 13. That in any case where a grant of the lands of the state under water is made by the commissioners, to any person other than the riparian owner that the state's grantee shall not fill up or improve said lands under water until the rights and interest of the riparian owner in said lands under water (if any he has) shall be extinguished, as fol-

lows: the said commissioners shall fix the amount to be paid to said riparian owner for his rights and interest therein (if any he has), and said riparian owner shall have the right, within twenty days after he has been notified of said amount, to accept said sum in full extinguishment of all his rights, or if he is dissatisfied with said award he may apply to the Supreme Court at the next term thereafter for a struck jury to try the question in such place as may be designated by said Court, and said jury may increase or diminish the amount to be paid the said riparian owner, and their verdict shall be final as to said amount, and on the payment or tender by the state's grantee to the riparian owner of the amount fixed by said jury all the rights and interests of said riparian owner in the lands of the state under water in front of his land shall be extinguished; that the costs of the trial shall be paid as follows: if the verdict of the jury is greater than the award of the commissioners then the state shall pay the costs of the trial, if the verdict is the same as the award or less than the award of the commissioners then the riparian owner shall pay the costs (Rev. 1877, p. 985)."

21. "Riparian owners; application to commissioners for lease or conveyance. Sec. 1. That any riparian owner on tide waters in this state who is desirous to obtain a lease, grant or conveyance from the State of New Jersey of any lands under water in front of his lands, may apply to the commissioners, appointed under the act to which this is a supplement and the supplements thereto, who may make such lease, grant or conveyance with due regard to the interests of navigation, upon such compensation therefor, to be paid to the State of New Jersey, as shall be determined by said commissioners, which lease, conveyance or grant shall be

executed as directed in the act to which this is a supplement and the supplements thereto, and shall vest all the rights of the state in said lands in said lessee or grantee (Rev. 1877, p. 985)."

26. "Commissioners may fix purchase money or rentals for lands below tide water; conveyances. Sec. 1. That from and after the passage of this act it shall be lawful for the riparian commissioners, or any three of them therein concurring, together with the governor of this state, to fix and determine, within the limits prescribed by law, the price or purchase money, or annual rental to be paid by any applicant for so much of lands below high water mark, or lands formerly under tide water belonging to this state as may be described in any application therefor duly made according to law; and the said commissioners, or any three of them therein acting and concurring, with the approval of the governor, shall in the name and under the great seal of the state, grant or lease said lands to such applicant accordingly; and all such conveyances or leases shall be prepared by the said commissioners or their agents at the cost and expense of the grantee or lessee therein, and shall be subscribed by the governor, and at least three of said commissioners, and attested by the secretary of state (Rev. 1877, p. 986)."

39. "Sale or lease of lands below mean high water mark. Sec. 4. That the riparian commissioners, or a majority of them, together with the governor, shall not hereafter be required to give leases for lands of the state under water, convertible into grants upon payment of the principal sum mentioned therein, but may sell or let any of the lands of the state below mean high water mark, upon such terms as to purchase money or rental, and under such conditions and restrictions as to

time and manner of payment, the duration and removal of any lease, the occupation and use of the land sold or leased, and such other conditions and restrictions as the interest of the state may require, as may be fixed and determined by said riparian commissioners, or a majority of them, together with the governor (P. L. 1891, p. 215).

(Inconsistent laws repealed.)

Cited: *Improvement Co. v. Railroad Co.*, 72 L. 137, 60 A. 44.

Preamble. Whereas, the Palisades situate in this state are liable to be irreparably injured or destroyed, unless measures be adopted for the preservation thereof; and whereas, by the insertion or imposition of proper and appropriate terms, conditions, restrictions and limitations in leases, grants and conveyances of the lands lying under water adjacent to or in front of the Palisades, the threatened injury or destruction thereof may, in a great degree, be averted."

No. 12200

UNITED STATES DISTRICT COURT

HENRY B. STEVENS, JR.

Petitioner

ARTHUR S. ARNOLD, ABRAHAM L. ERLANGER
and REAL ESTATE TITLE INSURANCE
AND TRUST COMPANY OF PHILADEL-
PHIA, Respondents, &c.

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Third Circuit.

BRIEF OF ARTHUR S. ARNOLD, et al.

GEORGE A. BODENBROS and
HARRY E. COHLONE,

*Attorneys for each of Counsel
with Respondents.*

ROBERT H. McCARTER,

Of Counsel.

Petition for Certiorari filed October 23, 1921.

Certiorari granted filed January 23, 1922.

(22,25)

1915

UNITED STATES DEPARTMENT OF COMMERCE

OFFICE OF THE SECRETARY

WASHINGTON, D. C.

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DEPARTMENT OF COMMERCE

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No. 598.

IN THE
UNITED STATES SUPREME COURT
October Term, 1921.

HENRY E. STEVENS, JR.,
Petitioner,

v.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER,
and REAL ESTATE TITLE INSURANCE
AND TRUST COMPANY OF PHILADEL-
PHIA, Executors, &c.

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Third Circuit.

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No. 598.

IN THE
UNITED STATES SUPREME COURT
October Term, 1921.

HENRY E. STEVENS, JR.,
Petitioner,
v.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER and REAL
ESTATE TITLE INSURANCE AND TRUST COMPANY
OF PHILADELPHIA, Executors, &c.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.


FACTS.

The defendants-in-error are the executors and trustees of Samuel F. Nirdlinger, the complaint below (who has died during the progress of the case). The bill of complaint was filed by him in the District Court of the United States for the District of New Jersey, with a two-fold aspect: first, under the New Jersey statute to quiet his title; and, second, under the general equitable jurisdiction of the Court to remove a cloud thereon. The premises in question border on the Atlantic Ocean at Atlantic

City, New Jersey, and are specifically described in paragraph 1 of the bill of complaint as amended (Record, p. 47).

The bill specifically alleges in accordance with the requirements of the statute (4 New Jersey Compiled Statutes, p. 5399):

- (a) The complainant's possession of the *locus*;
 - (b) Under a claim of title or ownership; and
 - (c) The assertion of a claim to or interest in the same by the defendant Stevens;
- and calls upon the defendant to assert and specify such claim and interest.

With reference to this feature of the bill, the defendant (Record, p. 12, pars. 4d and 4e) claims title to a part of the land described in the bill, admitting the complainant's ownership of the remainder, and that part so claimed, is shown by hatching on the following sketch adopted by the Court below (262 Fed. Rep. 595). The broken line has been added to display the boundaries of the entire tract. 

The answer (p. 12) claims that the determination of a previous suit in the state courts of New Jersey (a copy of the record in which is attached to the answer) (p. 15), between Stevens and Nirdlinger and the Dewey Land Company, which has since conveyed its interest to Nirdlinger is *res adjudicata* of the question.

On the 9th of October, 1915, an amendment to the bill of complaint was permitted (p. 34), giving the chain of title of the complainant to the *locus*, and showing (p. 39) that the complainant has ever since he acquired the interest in the premises described by the deeds referred to, paid the taxes, assessments and other charges imposed thereon. There is no contradiction of this.

The second aspect of the bill is found in para-

graph 6 (p. 7) and paragraph 7 of the bill as amended (p. 33) and alleges briefly the obtaining of a grant by Stevens' grantors from the Riparian Commissioners of New Jersey of certain described property, including the *locus* shown on said sketch) and claiming that said grant was and is illegal and void for the reasons stated.

The answer denies these allegations (p. 14) and sets up a counter-claim to the *locus* in the nature of a cross-bill, seeking to have his alleged title to the premises confirmed and asking that the complainant be enjoined from continuing to assert title thereto.

To this counter-claim the complainant filed an answer (p. 41) taking issue thereon, and again setting up his claim of title.

Considerable evidence was taken and Judge Haight filed an opinion (p. 175), reported in 262 Fed. Rep. 591, in which every question is carefully considered, overruling the defense of *res adjudicata* and determining that the complainant is entitled to the premises, and that Stevens has no right to or interest therein. From the decree (p. 191) based upon that opinion an appeal was taken to the Circuit Court of Appeals for the Third Circuit, which unanimously affirmed the decision for the reasons given by Judge Haight (p. 223).

The case is here by *certiorari* from this Court, and will be discussed under the following heads: *Res Adjudicata*, *Accretions*, *Riparian Grant* and *Quia Timet*.

RES ADJUDICATA.

DEFENDANT, BY HIS PLEADING, HAS ESTOPPED HIMSELF FROM URGING THE PREVIOUS ADJUDICATION AS A BAR TO THIS SUIT.

Plaintiff's bill seeks to have his title to the *locus in quo* fixed and determined, pages 5 and 34. Defendant answered, page 9, and in addition thereto, pages 14 and 15, interposed a counter-claim in the nature of a cross-bill against the plaintiff, in which he prayed affirmative relief, claiming that complainant's title to that portion of the land embraced in the riparian grant, made by the State of New Jersey to Bartletts, and conveyed by Bartletts to myself (defendant) (to wit, the *locus in quo*), injuriously affects his title thereto, etc., and prays that it may be adjudicated in this suit that his title in said lands is paramount, etc., and prayed an answer without oath. To this counter-claim, plaintiff filed a reply, page 41, denying the allegations in said counter-claim, setting up title in plaintiff. The matter was fully heard by the Court upon this counter-claim of defendant's and plaintiff's answer thereto, and the Court determined that issue upon its merits.

Having submitted himself to the jurisdiction of the Court, and having prayed that the Court determine the matter, and the Court having determined it, defendant cannot, in the face of his pleadings, which is an admission against him, claim that the plaintiff is not entitled to the benefit of the adjudication in the present suit because of the trial thereof in the New Jersey Chancery Court.

Megier v. Vohr 53 Cal 74
Seymour v. Fisher 92 Pa St. 490-501

THE DECREE OF THE NEW JERSEY COURTS IN THE CASE
OF DEWEY LAND CO. V. STEVENS IS NO BAR TO THIS
SUIT.

About 1910 a bill to quiet title under the New Jersey statute was filed on behalf of Dewey Land Company and Nirdlinger against Stevens, who claimed title to the triangular tract of land in dispute. This bill was based upon a claim of accretions, alleging that the high-water mark had moved oceanward. The answer admitted that the high-water mark had moved outward but made no claim to the title by reason of accretions, and based his claim upon a riparian grant made by the State of New Jersey. After the filing of the answer, no claim being set up except under the riparian grant, the bill was amended eliminating the subject of accretions and setting up title under two quit-claim deeds extending into the ocean to the original high-water line of 1852. In this trial in chancery, a portion of the land described in defendant's answer, to wit, the *locus in quo* was shown to be land above the high-water mark, to which the riparian grant could give no title. Upon final hearing the bill was dismissed, the Court of Chancery being of the opinion that the proceedings, to attack a riparian grant made by the State, must be in the name of the attorney-general of the State. An order was thereupon entered dismissing the bill in the following language:

"This matter coming on to be heard on the second day of February, 1912, in the presence of Robert H. Ingersoll and George A. Bourgeois, of counsel with the complainants, and of Wilson & Carr, of counsel with the defendants, and the Court having heard and considered the

proofs and the arguments of respective counsel, and it appearing to the satisfaction of the Court that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill of complaint contained and set forth, and that said bill ought to be dismissed with costs;

IT IS THEREUPON, on this seventh day of September, 1912, on motion of Wilson & Carr, solicitors for and of counsel with the defendants, ORDERED that the complainants' bill of complaint be and the same is hereby dismissed with costs.

IT IS FURTHER ORDERED that a fee of \$150.00 be and the same is hereby allowed to the solicitors of the defendant, the same to be taxed as part of the costs of this suit and to be collectible therewith.

E. R. Walker,
C."

(Exhibit E, page 52.)

To this order dismissing the bill of complaint an appeal was prosecuted to the Court of Errors and Appeals, which Court held that the Court of Chancery erred in holding that the proceeding must be prosecuted by the attorney-general, and also held that complainants acquired no title by virtue of the two quit-claim deeds, mentioning the fact that the bill had been amended excluding the question of accretions from the case, and affirmed the decree of the Court of Chancery in the following language:

"This cause having been brought to a hearing on appeal from the Court of Chancery at the June Term, 1913, of this court, and Bourgeois & Coulomb, of counsel with the appellants, and Wilson & Carr, of counsel with the re-

spondents, having been heard, and the questions brought up by the said appeal having been duly considered;

IT IS, on this fifteenth day of June, 1914, ORDERED, ADJUDGED AND DECREED that the decree of the Court of Chancery, made on the seventh day of September, 1912, which is appealed from by the appellants, be and the same is hereby in all things affirmed with costs in this court, and in the Court of Chancery, to be paid by the appellants, and that the petition of appeal be dismissed." (Exhibit F, page 53.)

In the latter part of November, 1915, defendant realizing that the Court of Chancery had not determined the matter filed a petition in the Court of Chancery praying to have the decree of dismissal amended. The petition setting up the final decree in the Court of Chancery, and the decree of affirmation in the Court of Errors and Appeals, alleging that the complainant had no right, title or interest in the lands described, prayed that the final decree entered in the Court of Chancery be amended to read that the complainant had no title to the lands, and the defendant had, a copy of which petition is found on page 211. This petition was dismissed on an opinion by Vice-Chancellor Backes, which is reported in 96 Atl. Rep. at page 362, advising the dismissal of the petition to amend in the following language:

"Moreover, looking into the opinion of the Court of Errors and Appeals, in the present case, I find that the judgment of that Court, dismissing the bill, was rested entirely upon the untenability of the complainants' claim to title, and in no aspect was the defendant's title pretended to be examined and confirmed. In such

circumstances, this Court, in its determination of the cause, would not have awarded the relief the defendant now seeks on this motion."

The order being as follows:

"This matter coming on to be heard in the presence of Harvey F. Carr, Esq., for the motion, and George A. Bourgeois, Esq., contra, and the Court having heard and considered the arguments of counsel thereon, and being of the opinion that the motion should be denied;

IT IS, THEREFORE, on this thirteenth day of December, 1915, on motion of Bourgeois & Coulomb, solicitors for and of counsel with the complainants, ORDERED that the petition to amend the decree in said cause be and the same is hereby dismissed, and the motion denied with costs.

E. R. Walker,
C.

Respectfully advised
John H. Backes,
V. C."

Judge Haight's opinion was filed on December 26, 1919, and about the first of June, 1920, defendant made an effort to have the remittitur in the Court of Errors and Appeals amended so as to decree that complainant had no title but that defendant had title to the *locus* and gave notice of a motion before the Court of Errors and Appeals to amend the remittitur filed in the case of Dewey Land Company, et als., v. Stevens, which notice was in the following language:

"To Bourgeois & Coulomb, Esquires,
Solicitors for Complainants-Appellants.
Take notice that we shall apply to the Court

of Errors and Appeals on Tuesday, the fifteenth day of June, nineteen hundred and twenty, at eleven A. M., on said day, or as soon thereafter as counsel can be heard thereon, at the State House in the City of Trenton, for an order amending the remittitur heretofore entered herein, so as to make the remittitur comply with the opinion of this Court, and so as to direct the Court of Chancery to enter a decree adjudging that the complainants have no estate, interest in, or encumbrance upon any of the lands hereinafter particularly described, and so far as relates to any claim thereon by or on behalf of the above-named complainants, the title of the defendants in and to the same and every part thereof is hereby determined, fixed and settled, and declared to be good; and for such further and other order as may be necessary to make the remittitur fully comply with the opinion of the court.

DESCRIPTION OF LANDS REFERRED TO.

ALL those certain tracts or parcels of land and premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

Tract No. 1. BEGINNING at the intersection of the fourth course of the description contained in the riparian grant from the State of New Jersey by Foster M. Voorhees, Governor, Willard C. Fisk, William Kloke, John I. Holt, and John J. Farrell, Riparian Commissioners, to William B. Bartlett and Elwood S. Bartlett, bearing date the 28th day of June, 1900, recorded in the office of the Riparian Commissioners of the State of New Jersey in Liber N, Folio 245, etc., also in the office of the Clerk of Atlantic County, New Jersey, in Book 248 of

Deeds, page 475, etc., with the easterly line of New Hampshire Avenue; thence southeasterly in and along the said fourth course of said deed to the high-water mark of the Atlantic Ocean; thence southwesterly in and along the high-water mark of the Atlantic Ocean to the easterly line of New Hampshire Avenue; thence northerly in and along the easterly line of New Hampshire Avenue to the place of beginning.

Tract No. 2. BEGINNING at a point where the high-water mark of the Atlantic Ocean intersects the fourth course of the description in the riparian grant from the State of New Jersey by Foster M. Voorhees, Governor, Willard C. Fisk, William Klope, John I. Holt and John J. Farrell, Riparian Commissioners, to William H. Bartlett and Elwood S. Bartlett, bearing date the 28th day of June, 1900, recorded in the office of the Riparian Commissioners of the State of New Jersey in Liber N, Folio 245, etc., also in the office of the Clerk of Atlantic County, New Jersey, in Book 248 of Deeds, page 475, etc., thence southeasterly in and along the said fourth course to the exterior line established by the Riparian Commissioners; thence westerly along the said exterior line curving to the right on a radius of 4000 feet to where the said exterior line intersects the extended easterly line of New Hampshire Avenue; thence northerly in and along the said extended easterly line of New Hampshire Avenue to the high-water mark of the Atlantic Ocean; thence easterly along the said high-water mark to the place of beginning.

Wilson & Carr
Solicitors for Defendants-
Respondents."

The application was denied, the Court entering the following order:

“This matter being opened to the Court by Harvey F. Carr, of the firm of Wilson & Carr, of Counsel with the defendants, in the presence of Bourgeois & Coulomb, and Robert H. McCarter, Esq., of Counsel with the complainants; and it appearing that notice was duly served of an application to amend the remittitur entered in the above stated cause at the June Term, 1913, so as to direct the Court of Chancery to enter a decree adjudging that the complainants have no estate, interest in or encumbrance upon any of the lands hereinafter particularly described, and so far as relates to any claim thereon by or on behalf of the above named defendants the title of the defendants in and to the same and every part thereof is hereby determined, fixed, settled and declared good; and for such further and other order as may be necessary to make the remittitur fully comply with the opinion of the court.

DESCRIPTION OF LANDS REFERRED
TO:

ALL those certain tracts or parcels of land and premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

Tract No. 1. BEGINNING at the intersection of the fourth course of the description contained in the riparian grant from the State of New Jersey by Foster M. Voorhees, Governor, Willard C. Fisk, William Klope, John I. Holt and John J. Farrell, Riparian Commissioners, to William H. Bartlett and Elwood S. Bartlett, bearing date the 28th day of June, 1900, recorded in the office of the Riparian Commis-

sioners of the State of New Jersey in Liber N, Folio 245 &c., also in the office of the Clerk of Atlantic County, New Jersey, in Book 248 of Deeds, page 475 &c., with the easterly line of New Hampshire Avenue; thence southeasterly in and along the said fourth course of said deed to the high-water mark of the Atlantic Ocean; thence southwesterly in and along the said high-water mark of the Atlantic Ocean to the easterly line of New Hampshire Avenue; thence northerly in and along the easterly line of New Hampshire Avenue to the place of beginning.

Tract No. 2. BEGINNING at a point where the high-water mark of the Atlantic Ocean intersects the fourth course of the description in the riparian grant from the State of New Jersey by Foster M. Voorhees, Governor, Willard C. Fisk, William Kloke, John I. Holt, and John J. Farrell, Riparian Commissioners, to William H. Bartlett and Elwood S. Bartlett bearing date the 28th day of June, 1900, recorded in the office of the Riparian Commissioners of the State of New Jersey in Liber N, Folio 245, etc., also in the office of the Clerk of Atlantic County, New Jersey, in Book 248 of Deeds, page 475, etc., thence southeasterly in and along the said fourth course to the exterior line established by the Riparian Commissioners; thence westerly along the said exterior line curving to the right on a radius of 4000 feet to where the said exterior line intersects the extended easterly line of New Hampshire Avenue; thence northerly in and along the said extended easterly line of New Hampshire Avenue to the high-water mark of the Atlantic Ocean; thence easterly along the said high-water mark to the place of beginning.

And the Court being of the opinion that defendants are not entitled to have such amendment, the same is, on the fifteenth day of June, A. D. 1920, denied.

Entered this twenty-sixth day of June, A. D. 1920, on motion of

Bourgeois & Coulomb,
Solicitors for Complainants."

We shall now proceed to demonstrate that there has been no adjudication upon the merits of the questions here involved, for of course we recognize the fact that were the situation otherwise, the complainant would be foreclosed from seeking a reconsideration of the questions.

In order intelligently to comprehend the exact force and effect of the decree in the other suit which is relied on by the defendant herein, it is necessary to consider the character of the other suit. It was a proceeding commenced, conducted and concluded under the New Jersey statute (4 C. S. of New Jersey, page 5399) entitled "An act to compel the determination of claims to real estate in certain cases and to quiet title to the same." The object of this act, which is analogous to but not identical with acts having a similar purpose prevailing in other States, is to enable a person *in the undisputed possession of land and claiming to own the same* to compel another who claims to have some interest in or lien upon such lands to assert such claim, the theory being that without this remedy the position of such a possessor of land is both embarrassing and remediless. He cannot eject, for he is in possession, and so the statute enables him to require the claimant to fly his flag. The whole proceeding is statutory and the statute defines what the bill shall allege; what shall occur if the defendant makes or abandons his

claim; or if, on the other hand, he relies thereon how he shall specify it; and in either of these events what decree shall be entered, if a proper case is presented.

In suits of this character it has been frequently held that the burden of proving the adverse claims whose validity is thus called into question is upon the defendant asserting it and that the normal position of the parties complainant and defendant in an equity suit is reversed, the defendant sustaining the burden of proof. *Ocean View Land Company v. Loudenslager*, 78 N. J. Eq. 572; *Beale v. Black*, 45 Id. 668; *McCullough v. Absecon Beach & Land Co.*, 48 Id. 170.

In the case of *Chandley v. Robinson*, 75 Atl. Rep. 180, which was a bill filed under this act, Vice-Chancellor Garrison held:

“The bill having charged and the answer of the defendant having conceded that the complainants at the time of the filing of the bill *were in peaceable possession of the land in question, claiming to own the same*, the burden is then upon the answering defendant to set up and prove such title in himself as he claims he has.”

In *Fittichauer v. Metropolitan Fireproofing Co.*, 70 N. J. Eq. 429-430, Vice-Chancellor Stevenson, speaking of this statute, says:

“The point to be kept in mind in examining this peculiar statute is that its main object is expressed in the first clause of its title, viz., to compel the *determination* of claims to real estate in certain cases. The ‘certain cases’ are those cases of hardship where the defendant out of possession makes a claim while the complainant in possession has no means of compelling the defendant, either at law or in equity,

to submit his claim for determination, and thus have it either established as valid or finally declared void. The great object of the statute is not to afford the complainant a new means of asserting and establishing his title, but to afford the complainant a means of compelling the defendant to either abandon or establish his title, or have it decreed invalid. * * *

"I think that great confusion has been made by this persistent effort of the complainant to state unnecessarily in his bill the claim which the defendant has made or is 'reputed' to have in respect of the land in question. If the complainant prove the jurisdictional facts the result is that the defendant is called upon *affirmatively to set forth and maintain by proofs* any adverse title or claim which he holds. The pleading of the defendant, if it sets forth a legal title, may be in effect a declaration in ejectment and if it sets forth an equitable title, it may be in effect a bill in chancery. This complainant is under no obligation even to exhibit his own title after the defendant has shown title. All that the complainant is obliged to show in the first instance is that he is in peaceable possession, and that no suit is pending in which the defendant's claim, whatever it may be, may be tested, and also, that he, the complainant, is unable to bring an action at law in which the test can be applied, *Jersey City v. Lembeck, supra*, and also, I think, that he, the complainant, is unable, except under the statute, to bring any suit in equity in which such test can be applied." * * *

He further states:

"If the affirmative pleading of the defendant which the statute prescribes sets forth a legal

claim, and neither party applies for an issue at law, or if such affirmative pleadings sets forth an equitable claim, then the court of chancery is to proceed with the suit on the part of the defendant which it thus brought. The statute leaves no doubt as to the course of procedure. It provides that: 'When such issue is not requested or as to the facts for which the same is not requested, the court of chancery shall proceed to inquire into and determine such claims, interest and estate according to the course and practice of that court.' What is the 'course and practice' of a court of equity where a party comes forward as the actor asserting affirmatively his title or interest in real estate for the purpose of having such title or interest determined? The complainant, as we have seen, is not obliged to exhibit his own title in his bill, and ought not, in my opinion, notwithstanding the practice which has prevailed, to unnecessarily undertake to set forth in detail the defendant's claim. A court of equity, 'according to the course and practice' which courts of equity have uniformly followed, ought to require the complainant to file a pleading joining issue with the defendant. It is immaterial whether this pleading be called a special replication, a statement (see rule 221 regulating interpleader suits) or a bill of particulars. Where the defendant sets forth an equitable claim, in large numbers of cases the pleading of the complainant in reply thereto would be in effect an answer to a bill in chancery."

He adds:

"I strongly incline to think that it is bad practice for the complainant to undertake to

specify the character, nature or extent of the claim of any of the defendants. Such practice is inconsistent with the fundamental theory of this statute, which is that the complainant is to compel the defendant affirmatively to *set forth and maintain* his own claim and to allow the defendant to set up any title or claim which he sees fit to set up."

If, upon the assertion of such a claim, the parties desire it, they are, by the fifth section, entitled to have an issue framed to have a jury pass upon the matter and in such a case the defendant is made the plaintiff in the issue, except when the proceeding is under an amendment to the act which in case of wild and unimproved lands permits the filing of a bill by the complainant without the assertion or proof of possession. *McGrath v. Norcross*, 73 N. J. Eq. 274.

There are three preliminary questions that constitute a *sine qua non* to the right of the plaintiffs successfully to prosecute such a suit and to require the defendant to disclose and assert his claim to the plaintiff, namely (a) that the plaintiff is in the peaceable possession of the *locus in quo*; (b) that he claims to own the same; and (c) that no suit is pending to enforce or test the validity of the defendant's claim. *Blakeman v. Bourgeois*, 59 N. J. Eq. 473; and these questions being jurisdictional facts, if denied, must be settled as a preliminary question. *Steelman v. Blackman*, 72 N. J. Eq. 330.

In the case of *Claron v. Thommessen*, which was a suit to quiet title under the statutes, filed in the New Jersey Court of Chancery, and determined on September 20th, 1922, the Court found that the bill of complaint should not have been filed under the statute to quiet title, and dismissed the bill, on the authority of *VanClave v. MacGregor* (72 Eq. 218). The

Claron case was carried to the Court of Errors and Appeals, and the decree of the Court of Chancery affirmed at the March Term of that court, 1923. As yet unreported.

The appellant studiously and persistently refuses to recognize the important element of a claim of ownership on the part of the plaintiff in a suit of this character.

"And this notwithstanding the statements from various opinions of the Court of last resort of New Jersey cited by him on page 12 of his brief in this court. For example, note the quotation from the opinion of the Court of Errors and Appeals in *Ocean View Land Company v. Loudenslager*, 78 N. J. Equity, 571:

"Where, under a bill to quiet title (Gen. Stat. p. 3486), the complainant has established, to the satisfaction of the Court of Chancery, that he is in peaceable possession of the lands described in his bill of complaint *claiming to own the same*, and that his title is denied or disputed, and no suit is pending to test the validity of such hostile claim, the burden of establishing such adverse claim is upon the person setting it up, in which case the Court of Chancery may order that, in a feigned issue, framed to test the validity of such claim, the defendant, or party setting it up, sustains the issue as plaintiff."

"The purpose of the act is to relieve, not persons who have the power to test the hostile claim by a direct proceeding in the usual mode, but to aid persons whose situation afford them no such opportunity. * * * It lends its aid to one in peaceable possession *under claim of ownership* to compel an adverse claimant to establish his claim; he may do so in equity or at law, but

in either case he is asserting a hostile claim against one in peaceable possession, which he must proceed to establish or abandon."

The statute is perfectly plain upon the subject that the plaintiff must not only allege possession, but that he is there under a claim of ownership. In *Stark v. Starrs*, 6 Wall. 402-410, the Court said:

"We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that 'any person in possession, by himself or his tenant, may maintain' the suit. His possession must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim or title must be exhibited by the proofs, and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

Perhaps some confusion exists in the New Jersey cases upon this feature of the jurisdictional pre-requisites because of the oft repeated statement by our equity Judges that it is unnecessary for the plaintiff in a bill of this character to set out the sources of his title entitling him to make his claim of ownership. In the opinion of Vice-Chancellor Stevenson in the case above quoted (*Fittichauer v. Metropolitan Fireproofing Company*) he doubts the propriety of making such a disclosure, indicating that in his opinion the preliminary pre-requisite is sufficiently stated by the naked averment of a claim on the part of the plaintiff to own the property of which he is in possession. In the Dewey Land case the plaintiff,

whether necessarily or not, set out in his amended bill, omitting the accretions, the Leeds' and McClees' deeds as the basis of his claim of ownership. Having done this, perhaps unnecessarily, the Court inspected them and found that the claim of ownership by reason thereof was altogether frivolous as the quit-claim deeds conveyed no title whatever.

If there is no question raised as to these jurisdictional pre-requisites the statute then imposes upon the defendant the duty either to disclaim or to assert his claim, in which latter event the fifth section imposes upon the Court the duty to

“Finally settle and adjudge whether the defendant has any estate, interest or right in, or encumbrance upon the said lands or any part thereof, and what such interest, estate, right or encumbrance is, and in or upon what part of said lands the same exists.”

In the case at bar, the jurisdictional facts not being in issue, the defendant at the outset of the hearing, assumed the burden and offered his proofs (p. 87).

The next section (6) characterizes the effect of such determination as follows:

“The final determination and decree in such suit shall fix and settle the rights of the parties in said lands, and the same shall be binding and conclusive on all parties to the suit.”

This being the function and object of the suit and the duty of the Court in the premises, suppose, for any reason, the Court is unable to reach a determination; what must happen to the suit? Obviously the bill must be dismissed. This is exactly what occurred in *Steelman v. Blackman*, *supra*, but no one would have the hardihood to contend that the com-

plainant in that suit, having later acquired peaceable possession of the land under a claim of ownership could not have filed a bill and required a meritorious decision. Another example is *Oberon Land Company v. Dunn*, 60 N. J. Eq. 280, where, pending the trial (here an issue of law was had as permitted by the statute) it transpired that both the complainant and defendant had parted with their respective interests in the *locus in quo*, and the Vice-Chancellor said:

“In the admitted present condition of this controversy each party has by deed parted with all interest in the subject-matter of the suit. Their grantee is a stranger who cannot be bound by any decree made therein. By the statute the decree ‘shall fix and settle the rights of the parties in the said lands,’ &c. Gen. Stat. p. 3487, Sec. 6. But the undisputed proof is that neither party has any rights in any of the said lands to be bound by any decree.

“The suggestion for further proceedings on this bill to quiet title, which, so far as the parties to the suit are concerned, is already quieted by their own acts, is an invitation to the Court to hear argument upon a purely hypothetical question and to make a decree which will be wholly inoperative. That is not the purpose for which courts hear causes. The parties have themselves, in a binding way, settled the whole controversy.

“No question of costs even remains to be decided. It is well established that where the parties settle their differences out of court without reference to the costs, each party shall pay his own costs. *Bruce v. Gale*, 2 Beas. 211, and cases there cited.

“The bill of complaint and proceedings thereon should be dismissed, without costs allowed to either party against the other.”

The record in the earlier suit discloses (page 15) that the complainants filed their original bill setting up their possession of an original tract of land and claiming that by accretions thereto they had become entitled to and were in possession of the accreted territory, which they particularly described, possession of which under a claim of ownership by accretions as aforesaid they averred in themselves and then asserted that the defendant had some claim or interest therein which they called upon him to assert and as to which they asked the judgment of the Court. This bill was later amended (page 18) in which their possession was again asserted of the same territory but their claim of ownership thereof, instead of having been asserted to arise by reason of accretions was based wholly upon two deeds which they had obtained from former owners, being deed from John McClees dated November 1st, 1911 (two years after the filing of the original bill) and the other from Horace M. Leeds dated the first of February, 1912. The amended bill, after reciting these two deeds averred:

“That the said deeds are in your orators’ possession, and ready to be produced and proved as may be directed; *and that your orators have ever since the recording of said deeds respectively, been in the peaceable possession of the land therein and above described, and that at the time of purchasing said lands, and taking said deeds, your orators believed and yet believe that they and each of them bought and acquired a good title to said lands, and of the said equal undivided one-half part*

thereof, and they have always claimed, and do now claim to own the same accordingly."

These undisputed facts are the foundation for the statement in the opinion of Mr. Justice Swayze in the other case, 83 N. J. Eq. 314:

"The bill heretofore filed claimed title by accretion. This claim was abandoned and, by an amended bill, the complainants set up title by deeds from former owners."

Before this amendment to the bill was made, the land was described as extending to the high water line, thence to the exterior line established by the Riparian Commissioners. The defendant had filed his answer to the original bill, p. 22, setting up title to a portion of the land above high water mark, which constitutes the *locus in quo*, as well as land under water, under a riparian grant, and not otherwise, stating paragraph 2:

"This defendant admits that the shore line of the said tract of land has been extended by alluvial deposits and that the high-water line of the Atlantic Ocean has been carried out, but as to the exact extent thereof this defendant is ignorant and leaves complainant to prove the same,"

and when the case came on for hearing no other or further answer was filed to the amended bill. The statute requires no reply on behalf of the complainant to the answer and so none was filed.

The issues, as thus framed, came on for hearing before the Court, testimony was taken, and the Court filed a short, unreported memorandum directing that the bill be dismissed, following, as he supposed, the case of *Sooy Oyster Company v. Gaskill*, 69 Atlantic Rep. 1084, to the effect that as the defen-

dant claimed title to the *locus* under a riparian grant from the State, it was impossible to attack that grant in a collateral proceeding which the Court deemed it was the plaintiff's effort to do. In the case last referred to Vice-Chancellor Leaming, on an application for injunction to restrain certain oystermen from taking oysters from land granted to the defendant by the riparian commissioners, in advising a decree in favor of the company said:

"I cannot refrain from expressing a regret that I am compelled to arrive at the conclusion stated. The affidavits filed disclose that the land in controversy is probably natural oyster beds, and as such is land which the riparian commissioners had no power to convey. Defendants desire to adjudicate upon the validity of the grant, and I regret my inability to afford them such an adjudication in this case. If complainant's title is to be adjudicated, it must be by a direct proceeding in the name of the attorney-general, and I entertain no doubt but that if defendants will cause the data now before this court to be properly placed before the attorney-general, accompanied with a bond to secure the State against costs, leave will be granted for the necessary proceedings to raise the issue sought."

This is the case to which the Court of Chancery referred in dismissing the bill in the Dewey Land case.

The question of accretions as a basis for the complainant's claim of title having been eliminated, and the Vice-Chancellor, evidently, being of opinion that the quit-claim deeds conveyed no title in the upland to the complainant because the testimony showed that the land was the result of accretions, in view of the well-settled rule hereafter referred to in this

brief of the ambulatory character of a riparian grant; and being, apparently, further of the opinion that as to the lands under water the complainant could not maintain his suit in his individual name, but must seek the name and aid of the attorney-general, dismissed the bill, whereupon the decree already quoted, reciting that the complainants appearing not to be entitled to any relief by reason of the matters and things in the bill of complaint contained (i. e. having no right to attack as an individual the riparian grant under which alone the defendant claimed), it was ordered that the bill be dismissed. No mention was made concerning plaintiff's claim of title, nor was it considered.

The complainants then appealed and the Court of Errors delivered two opinions, that by Mr. Justice Swayze, 83 N. J. Eq. 314, and one by Judge White, Id. page 656. The result of this appeal was an affirmance of Vice-Chancellor Walker's decree but not for the reasons set forth in the Vice-Chancellor's memorandum. On the contrary, the Court was unanimously of the view that there were circumstances that permit complainants to question the validity of the title asserted by defendants under a riparian grant, and that the present case was not within the reason of the cases cited and relied upon by the Vice-Chancellor to prevent what he called a collateral attack upon a riparian grant. Justice Swayze's opinion, after showing the original title to all of the territory surrounding the *locus* and the fact that the complainants had acquired the Leeds and McClees deeds to the *locus*, and taking pains to state

“Inasmuch as all claim by accretion is waived the complainants amended bill must fall unless they acquire title from the Leeds heirs or McClees,”

reached the conclusion that as the title thus derived is no title whatever, the complainants' bill must be dismissed, obviously upon the basis of a failure of the necessary jurisdictional pre-requisite of a claim not only a possession but of a claim of ownership. Thereupon the original decree of affirmance hereinabove quoted was entered. It is perfectly obvious that no adjudication whatever has yet been made upon the validity of the defendants' claim to the *locus in quo*—the only object of the New Jersey suit—and hence we contend that upon familiar and fundamental principles the defense of *res adjudicata* is unavailable. Attention in this brief has already been directed to the fact that the defendants, in evident appreciation of this idea, and long after they filed their answer in this suit, applied to the Court of Chancery for leave to amend the decree in the other suit so that it would, on its face, purport to have disposed meritoriously of the question. This application, as we have seen, was denied by the Court of Chancery; and after Judge Haight wrote his opinion in the case at bar, a similar application was made, as we have already seen, to the Court of Errors and Appeals, to amend its decree in the old case, but without avail. The Court of Errors and Appeals, in the earlier case, realizing that the defendant's riparian grant gave him no title to the land above the high-water mark, declined to decree that the defendant had title thereto, and, speaking of the *locus in quo* said:

“If the land belonged to the State at the time of the grant by reason of then being under tide water but has reverted to its former owners by matters arising after the grant, the complainants are not in the position of questioning the grant but of conceding its validity and claiming

that the title thereby granted has ceased to be effective."

That language is inconsistent with any notion of a final determination of title to these accreted lands adverse to the complainant. The Court of Errors did hold that as to the lands under water covered by the riparian grant, and as to which complainant holds only quit-claim deeds from the heirs of McClees and Leeds, the complainant derived no title thereby and that as to the lands under water complainant had no other title because the deeds from the Atlantic City Beach Front Improvement Company, by the terms thereof, stop at the high-water mark, and hence, concluding that the complainants essential jurisdictional averment that it was in possession of the land under a claim of title, was untrue, dismissed the bill. All that the New Jersey Court of Errors and Appeals undertook to decide and did decide (beyond expressing their disapproval of the Vice-Chancellor's view that under no circumstances could the riparian grant be collaterally attacked) was that the complainant did not have a good title by virtue of the Leeds and McClees deeds set out in the amended bill. The decree of affirmance of the dismissal of the bill by the Court of Chancery was intentional. The Judges of that court are thoroughly familiar with the provisions of the act under which that bill was filed; they knew that when a case comes before them if it is ripe for determination the statute requires them to determine the rights of the parties therein, and inasmuch as the case went off upon a lack of jurisdiction the decree of affirmance of the dismissal of the bill in Chancery was no oversight but plainly and obviously correct.

It is well known that the Court of Errors and Ap-

peals of our State has no original jurisdiction and was without power in law to fix and determine by decree the rights of the parties to the *locus in quo*. Its authority was only to affirm, reverse or send the cause back with the direction that the Court of Chancery should render a decree in accordance with the opinion of the Court of Errors and Appeals. *New Jersey Franklinite Co. v. Ames*, 12 N. J. Eq. 507; *Black v. Del. & Raritan*, 24 N. J. Eq. 455-482.

Its affirmation of the decree in the Court of Chancery of a dismissal of the bill, when considered in connection with the statute requiring the Court to fix and determine the rights of the parties in the land, had only such effect as a non-suit would have had at common law, because if the Court of Errors and Appeals had intended to fix the rights of the parties to the lands in question, it would have remitted the record to the Court of Chancery with a direction to enter such decree as it indicated, and would not have simply affirmed the dismissal of the Court below.

In the case of *Blatchford v. Conover*, 40 N. J. Eq. 205-218, our Court of Errors and Appeals, speaking by Mr. Justice Depue, said:

“The complainant’s bill having been filed under the act to compel the determination of claims to real estate in certain cases and to quiet the title to the same, the decree in this suit must fix and settle the rights of the parties in the premises. So much of the decree appealed from as determines that Conover’s title is superior to that of Blatchford’s should be reversed and a decree be entered declaring Blatchford’s title under his deed superior to that of Conover’s under his sheriff’s deed, with costs to be taxed against the complainant.”

The riparian grant to Stevens was made under the Act of 1871 (4 N. J. Compiled Statutes, p. 4383), and in language is precisely similar to the grant made in the leading case of *Polhemus v. Bateman*, 60 N. J. Law, 163-167, wherein it was held that a riparian grant under the Act of 1871, confers upon the grantee only the *right to reclaim the lands under water and that until the lands have been reclaimed the grantee has no exclusive rights therein*.

In the case above mentioned the Court said:

“So it may be admitted that the deed to Bateman under the Act of 1871, in the absence of any language limiting its operation and effect, would have passed to him all the rights of the State in the lands under water, but the deed contains the proviso that he is to have the right, liberty, privilege and franchise of excluding the tide water from so much of the land as lies under tide water by filling in or otherwise improving the same, and to appropriate the lands to his exclusive use. This language restricts the grant, and nothing in excess of it passes to the grantee. His rights under it must be interpreted by the words of the conveyance. He may fill in and otherwise improve the same and appropriate the lands so improved to his exclusive use. If he is permitted to appropriate the lands to his exclusive private use without filling in or improving, no effect is given to the previous language, and the deed will be given the same effect as if it contained only the proviso that he could appropriate the lands to his own exclusive private use. Such a construction of the deed, under the well-settled rules of interpretation, is inadmissible. The State made the grant and Bateman accepted it in this form, and it cannot

be enlarged beyond the clear meaning of the words used. Bateman acquired no title to the exclusive use of any portion of the land under water until he filled in and reclaimed or improved it. The grant was only for the purpose of reclamation."

Under these circumstances, what final decree, if any, could have been made in favor of the defendant? He was not entitled to the upland by virtue of his riparian grant, and he was not entitled to any exclusive use of the land under water. He could only become entitled to such exclusive use of the land under water by reclaiming it, which he had not done, but which as to the land then under water he might do in the future. The Court could not have decreed that he was vested with the title to the land under water because he would not become so entitled until reclamation, and he might never reclaim. The Court could not decree that he had no rights in the lands under water because he had the right of future reclamation. So that as to the land above high water, he had no rights whatever, and as to the lands under water he had only a contingent interest, which accounts for the affirmance of the decree of dismissal.

The sixth section of the Act To Quiet Titles provides that the final determination and decree in such suit shall fix and settle the rights of the parties in said lands, and it is respectfully submitted that no decree in a case under the statute which fails to fix and determine the title of the parties in the lands is a final decree. In other words, under this statute the parties can litigate and re-litigate until the Court by its final decree *fixes and determines the rights* of the parties in the lands.

In Section 682 of *Black on Judgments*, the law is stated:

“A verdict without a judgment entered thereon is of no validity either as an estoppel or as evidence.”

In this case the decree of the Court of Errors and Appeals did not attempt to fix or determine the rights of the parties in the *locus in quo*. It ordered, adjudged and decreed that the decree of the Court of Chancery made on the 7th day of September, 1912, which is appealed from by the appellants, be and the same is hereby in all things affirmed with costs in this suit and the Court of Chancery to be paid by the appellants, and that the petition of appeal be dismissed.

The principle underlying the plea of *res adjudicata* is familiar. In *Hughes v. The United States*, 4 Wall. 232, Mr. Justice Field in referring to a claim that the disposition of a previous action constituted the present suit *res adjudicata* said:

“The second case was a petitory action, brought by Sewall and Hudson, claimants under Goodbee, having for its object the vacation of the patent, the annulment of the above judgment against Sewall, then pending on appeal in the Supreme Court of the State, the recovery of damages, and the obtaining of an injunction. No judgment was passed upon the merits of any matter alleged. The petition was dismissed for want of jurisdiction and the absence of proper parties, so far as it related to the special relief sought by this suit—the vacation and surrender of the patent—and it was dismissed generally on the ground that it was ‘defective, uncertain, and insufficient in the statement of the cause of action.’

“It requires no argument to show that judgments like these are no bar to the present suit.

In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, it was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to, another suit."

In *Smith v. McNeal*, 109 U. S. 426, a suit had been begun for the recovery of the land which had been dismissed for want of jurisdiction by reason of the omission in the pleadings of a jurisdictional fact, and the question arose as to the effect of that dismissal upon the present action. Mr. Justice Woods, after citing *Hughes United States, supra*, and *Walden v. Bodley*, 12 Peters, 156, in which the Supreme Court said:

"A decree dismissing a bill generally may be set up in bar of a second bill having the same object in view, but when the bill has been dismissed on the ground that the Court had no jurisdiction, *which shows that the merits were not heard, the dismissal is not a bar to the second suit.*"

says:

"The cases would seem to settle the question against the defendant-in-error for they decide that the dismissal of a suit for want of jurisdiction is upon a ground not concluding the right of action."

In *Vicksburg v. Henson*, 231 U. S. 259-269, the Supreme Court said:

"It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. *Graham v. Railroad Company*, 3 Wall. 704, 710; *Reynolds v. Stockton*, 140 U. S. 254; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 507; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 223; In *Barnes v. Chicago, M. & St. P. Ry. Co.*, 122 U. S. 1, this court, speaking by Mr. Chief Justice Waite, said (p. 14):

"'Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided.'"

Inasmuch as the land in dispute is above the high water line, and the answer of defendant in the previous case limited its scope to land under the riparian deed, which gave the right of reclamation only, which had not been exercised, and admitted that the high water line had been carried out, thus, leaving the *locus in quo* above the high water line, the subject matter of defendant's answer was different from the subject-matter in this suit.

Inasmuch as the decree in the other suit was a dismissal of the complainant's bill without determining the rights of any of the parties in the controversy those rights still remain undetermined. It is apparent, therefore, that the record in decree in the New Jersey suit is no more effective as an estoppel or as *res adjudicata* against the present complainants, who have since acquired the title of the

Dewey Land Company to the *locus in quo* than the decree dismissing the bill in the case of the *Oberon Land Company v. Dunn*, *supra*, where, *pendente lite*, the parties complainant and defendant had sold out their respective interests in the *locus in quo*.

The conclusion of the opinion of Justice Swayze, 83 N. J. Eq. 317, was

“We think the complainants fail to establish the title set up in the amended bill; the decree of dismissal must, therefore, be affirmed with costs.”

It is, however, urged that the complainant in the other case might have relied upon his title by accretions as a basis or foundation for his suit. The answer to this claim, however, is obvious. A judgment or decree is *res adjudicata* or conclusive upon a matter that might have been litigated as well as one that was litigated *only in situations where the cause of action is the same*. The leading case making this distinction is *Cromwell v. The County of Sac*, 94 U. S. 351, where Mr. Justice Field said:

“The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

“In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered

upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defense actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defense were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

“But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one

cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

“The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram v. Morewood*, 3 East. 346, the defendants were held estopped from averring title to a mine, in an action of trespass for digging coal from it, because, in a previous action for a similar trespass, they had set up the same title, and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenbrough, in his elaborate opinion, said: ‘It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue, solemnly found against them.’ And in the case of *Gardner v. Buckbee*, 3 Cowen, 120, it was held by the Supreme Court of New York, that a verdict and judgment in the Marine Court of the City of New York, upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were con-

clusive upon the question of the character of the sale in an action upon the other note between the same parties in the Court of Common Pleas. The rule laid down in the celebrated opinion in the case of the Duchess of Kingston was cited, and followed: 'That the judgment of a court of concurrent jurisdiction directly upon the point is as a plea at bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court.'

"These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that, if not thus involved, the judgment would be inoperative as an estoppel. In the case of *Miles v. Caldwell*, reported in the 2nd of Wallace, a judgment in ejectment in Missouri, where actions of that kind stand, with respect to the operation of a recovery therein as a bar or estoppel, in the same position as other actions, was held by this court conclusive, in a subsequent suit in equity between the parties respecting the title, upon the question of the satisfaction of the mortgage under which the plaintiff claimed title to the premises in the ejectment, and the question as to the fraudulent character of the mortgage under which the defendant claimed, because these questions had been submitted to the jury in that action, and

had been passed upon by them. The Court held, after full consideration, that in cases of tort, equally as in those arising upon contract, where the form of the issue was so vague as not to show the questions of fact submitted to the jury, it was competent to prove by parol testimony what question or questions of fact were thus submitted and necessarily passed upon by them; and by inevitable implication also held that, in the absence of proof in such cases, the verdict and judgment were inconclusive, except as to the particular trespass alleged, whatever possible questions might have been raised and determined. * * *

“It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.”

The rule is settled with the same firmness in New Jersey, *City of Paterson v. Baker*, 51 N. J. Eq. 49, where it is held:

“There is a difference between the effect of a judgment when it is set up in a second action founded on the same claim or demand on which the first action was founded, and when it is set up in a second action founded on a different

claim or demand from that on which the first action was founded. When the second action is founded on the same claim or demand the judgment is conclusive not only as to all matters which were actually litigated and decided, but as to all which might have been; but when the second action is founded on a different claim or demand the judgment is conclusive only as to such matters as were actually litigated and determined."

In *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq., 658-662, Vice-Chancellor Reed says:

"In respect to the first phase in which the question of estoppel presents itself, it is entirely settled that after one judicial determination by a court of competent jurisdiction, a second suit for the same matter, between the same parties or their privies, cannot be litigated in the same or any other court. Nor does it matter that, in the first suit, evidence existed which was withheld or undiscovered, or that the law was misconceived by the Court, or left uncited by counsel, or that no defense was made and judgment went by default, or that only one of several defences was interposed by the defendant; in spite of any of these defects in the prosecution or defence of the action, the judgment stands as an absolute bar against a second litigation of the same cause of action.

"When, however, a second suit is brought not for the same demand, but for a cause which was a part of the same matter, but was not included in the first action, the estoppel is not so sweeping. In such instances only those issues which are common to both suits, and which had to be or were actually decided in the first suit, are

regarded as *res adjudicata* in the second. This distinction between the two kinds of estoppel is lucidly stated by Mr. Justice Field in *Cromwell v. Sac County*, 94 U. S. 351. In that case there has been an action upon certain county bonds, in which action the county succeeded. In a subsequent action by substantially the same parties, upon other coupons on the same bonds, the previous judgment was set up as an estoppel. Mr. Justice Field, after speaking of the absolute estoppel as to every ground which might have been presented in the proceeding case, when a second action is brought for the same cause, goes on to say: 'When a second action is upon a different claim, the judgment in the prior action operates as an estoppel only as to those matter in issue or points controverted upon the determination of which, the finding of the verdict was rendered. In all cases, therefore, when it is sought to apply the estoppel of a judgment in one case to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated or determined.' "

In *Mercer County Traction Co. v. The United New Jersey Railroad and Canal Company*, 64 N. J. Eq. 588, a petition was filed by the traction company, to secure from the Court a method of crossing the railroad tracks of the Pennsylvania Railroad Company, and in opposition the want of the necessary consents to enable the trolley company to be properly constructed was raised. To meet this the petitioner offered the record of a certiorari proceeding by the railroad company against the petitioner,

brought to review the ordinance passed by the Township of Hamilton giving the petitioner permission to lay its road upon the highway. The certiorari had been dismissed, and hence it was urged that inasmuch as the want of consents could have been alleged therein the judgment on the certiorari was an estoppel in this proceedings. It was, however, held:

“This judgment would conclude the two parties mentioned in any proceeding brought directly to test the validity of that ordinance. The doctrine of *res judicata*, however, differs when applied to a new proceeding for the same, or part of the same, cause of action, and when applied to a different cause of action. In the former instance, everything that could have made for the plaintiff or for the defendant is settled by the first judgment. In the latter instance, only those issues actually presented and decided are concluded. *City of Paterson v. Baker*, 6 Dick. Ch. Rep. 50; *Clark Thread Co. v. William Clark Co.*, 10 Dick. Ch. Rep. 658, 662. The present proceeding must be regarded, not as a direct attempt to litigate the validity of the ordinance, but as a new proceeding in which the validity of the ordinance and the existence of certain conditions essential to the validity of the ordinance comes into question. Therefore the only point upon which the Pennsylvania Railroad Company is estopped are those actually litigated in the certiorari proceedings. The issue actually tried in that proceeding was whether the ordinance was good as against the reasons filed for its vacation.

“In *North River Meadow Co. v. Shrewsbury Church*, 2 Zab. 424, an action of debt was brought to collect an assessment imposed upon lands belonging to the church. The meadow

company, in support of the assessment, put in evidence the record of a proceeding in certiorari, prosecuted by the church, to test the legality of the assessment. In this proceeding the assessment had been held to be legal. The Supreme Court held that, in the subsequent action to collect the assessment, the church was estopped from asserting that the assessment was invalid. It was so held upon the ground that the reasons assigned by the church for vacating the assessment in the certiorari proceeding embraced all the points suggested on the trial of the later action. It is true that, in the certiorari proceedings brought to test the ordinance in this case, general, as well as special, reasons were assigned for its vacation; but the Court was not obliged and, under its practice, would not notice the former, and, in fact, did not do so.

“Inasmuch as the want of filed consents by the abutting owners was not assigned as grounds of objection to the ordinance, the Pennsylvania Railroad Company is not estopped from now setting up this objection.”

The effect of these decisions is this: Assuming that the New Jersey case is *res judicata* of anything all that it does determine is that the title of the complainants' predecessor to the *locus in quo*, arising by virtue of the Leeds' and McClees' deeds, is invalid. The effect of that adjudication is (if it amounts to anything) to estop the complainant from hereafter asserting in any proceeding any right by virtue of those deeds. He cannot in any proceeding claim that there was something in connection with the deeds which was overlooked and not brought to the Court's attention, and that there-

fore he is entitled to again litigate their effectiveness. In a word, the complainant's mouth is forever closed from making any claim to the *locus in quo* by virtue of those deeds, whether the particular point with reference to the deeds was or was not considered in the New Jersey case, but no estoppel exists with reference to the entirely distinct and new claim not litigated in the New Jersey suit, arising from the accretion. Here is a distinct muniment of title; just as distinct as if the complainant was relying upon other deeds, and the plea or claim of *res adjudicata* is, therefore, ineffectual. It is for this reason that Judge White, in his opinion, reported in 83 N. J. Eq. at p. 664, says:

“Whether, under this view, the state's grant to Bartlett is valid, in so far as it includes land on the opposite side of New Hampshire Avenue from the location of the grantee's high land at the time the grant was made, is not before the court, because complainant sets up no title thereto except the recent McClees' and Leeds' heirs deeds, and these, obviously, conveyed nothing. If complainants have any title to the *locus in quo*, it must be by virtue of its being an accretion to their high land on the east side of New Hampshire Avenue. * * *

It must be remembered that the statute—and this is wholly a statutory proceeding—makes no provision for a reply or counter-plea by the complainant to the claim which the defendant in his answer sets up. If the complainant can successfully bridge over the preliminary jurisdictional questions then the defendant occupies the position of *actor* or plaintiff and must establish the validity of the claim he has in his answer specified. The only purpose served by the complainant's allegation of the ground of his

claim of title, is to satisfy the Court that such claim is not merely frivolous. The Court of Errors in the New Jersey case concluded, inasmuch as the two quit-claim deeds of Leeds and McClees conveyed no title whatever that the claim was frivolous, and hence found that the plaintiff in that action was in no position to call upon the defendant to assert and prove his claim. There is nothing that required complainant in that action to manifest every claim that he had or might possess with reference to the land as a foundation upon which to fasten upon the defendant the duty of asserting his claim thereto. If the bridge had been crossed, then it would have been the duty of the Court to have settled the respective rights of the parties to the *locus* with reference to the claim thereto asserted by the defendant.

If defendant's theory is correct that the suit of *Dewey Land Company v. Stevens* is *res adjudicata*, then we have this anomaly: Of course, if it is *res adjudicata* against us, it would be in a suit instituted by defendant *res adjudicata* against the defendant, as that principle of law is mutual. Therefore, if his contention be true and we cannot maintain this suit because of the previous decision, and realizing that it is true that in the previous case the Court did not determine the rights of the parties, the situation is as follows: We are in peaceable possession of the land.

Defendants have a cloud upon that title which we desire to have quieted. We cannot have the title quieted because the previous suit is *res adjudicata*. Defendant cannot eject us because the suit of *Dewey Land Company v. Stevens* is *res adjudicata*, therefore defendant can never secure possession of the land and we can never remove his claim. The title must forever remain imperfect and with that imperfect title his possession is forever secure.

The other aspect of the bill, presented by virtue of the new equity rules, is asserted in the sixth and seventh paragraphs of the bill, and is entirely independent of the New Jersey statute referred to, and is an appeal to the original equitable jurisdiction of the Court *quia timet* seeking to remove from the title of the complainants to the *locus in quo*, the cloud thereon arising by virtue of the riparian grant, which is alleged to be void and of no avail against the complainants. There is no pretense that this issue was raised in the New Jersey case.

The distinction between these two causes of action is noted in *Nixon v. Walter*, 41 Eq. 103, wherein a tract of land bounding on the high-water mark of Delaware Bay and Morris River Cove, having a width of six rods, was conveyed to one person and the land more remote from the bay was conveyed to another person, having for one of its boundaries the inward line of the six rod strip previously conveyed. The waters of the bay and cove gradually submerged the six acre tract, which at the time of the conveyance was high land, whereupon the owner of that tract made claim that he was entitled to a moveable freehold, citing the case of *Scratton v. Brown*, and the owner of the more inland tract filed a bill to quiet title under the statute, but failed to maintain it as such bill because he was unable to prove peaceable possession, which had been denied by the defendant. He was permitted to maintain the bill as a bill *quia timet*, and obtained a decree in his favor, the Court holding that the six rod strip of upland was a fixed freehold, and as that strip was eaten away by erosion, the owner thereof lost just as in the event of accretions he would have gained by the action of the waters. The right to maintain a bill *quia timet* is further shown by the following cases: *Sheppard v. Nixon*, 43 Id. 627;

American Dock & Improvement Co. v. Trustees for the Support of Public Schools, 39 N. J. Eq. 409.

There are, therefore, two distinctions between the suit at bar and the New Jersey case, the decree in which is claimed to be *res adjudicata* of this issue.

First: Assuming, which we deny, that the New Jersey case decided anything and is *res adjudicata* of any thing, it simply held that we have no title by virtue of the Leeds' and McClees' deeds. Here we are claiming both possession and title by virtue of accretion, an entirely distinct thing as appears from the opinion of Mr. Justice Swayze.

Second: We assert an independent claim under the general equitable jurisdiction of the Court, to have the cloud arising from the riparian grant removed, and our right to this relief is based not upon the statute, but upon equitable principles *quia timet*. It is, therefore, obvious that, attributing to the New Jersey case the dignity of an adjudication (which it does not deserve), neither one of the issues here raised was raised there.

Indeed it is believed that the argument in the opinion of Judge Haight upon this subject is unanswerable and leaves little to be added.

The distinction between the statutory action *quia timet* and the general jurisdiction of a Court of Equity *quia timet* is obvious, and plainly appears in the article entitled "Quieting Title" in 32 *Cyc.* p. 1305 and 1387 in which the effect of a decree in the one case is shown to be very different from that in the other.

Appellant's brief (p. 19) would indicate that the prayers of the two bills are the only distinguishing marks between them, ignoring the additional averment (p. 7, §6 and p. 33, §7), in the stating part

of the bill in the new suit setting up this new feature as a further and distinct cause of action.

It is therefore plain that the complainant under this second ground of jurisdiction has the right to have the Court adjudge that the cloud which the riparian grant of the defendant creates upon the *locus*, as well, since the amendment to his answer, as that created by his claim for accretions, should be adjudged of no avail. We have already indicated the consequences of leaving the matter as the defendant would have it. Our possession could not be disturbed; and, on the other hand, we could in no way have the Court pass upon the validity of these two claims upon the *locus* that the defendant persists in asserting.

Under the New Jersey Statute, in a proper case, the Court of Chancery is required to fix and determine the title of the parties. In the case at hand, if this suit is *res adjudicata* as to one of the parties, it is *res adjudicata* as to the other, and if *res adjudicata* as to the plaintiff, there is a cloud upon the title of plaintiff which he cannot have removed, because the Court failed to fix the title in plaintiff, and the defendant can never question plaintiff's possession or title in another suit, because title to land being in question and the previous suit being *res adjudicata* touching title, the Court not finding title in the defendant, is forever estopped from asserting title or possession against plaintiff. The result would be that the title of plaintiff must, therefore, forever remain under a cloud, but with that clouded title, his possession is forever secure.

The property is excessively valuable and to permit the complainant to be placed in this anomalous situation by a mere surmise as to what was intended in the other suit would be, as Judge Haight in his opinion suggests, the height of folly and injustice.

ACCRETIONS.

In the trial of this cause, defendant specifically stated to the Court that he was making no claim to accretions, but claiming under his riparian grant (see discussion, pages 84, 85 and 86), and the following conclusion:

"The Court: Well, I don't understand that that was his point, I take it—I may be entirely wrong, what his point is that at the time of the grant by the riparian commissioners the high-water line was at a point about where the ground begins to go eastward or towards the ocean and that therefore that was all land under water that was covered by the grant, and therefore that he had a right to it, isn't that your point?"

Mr. Carr. See State's map theory

Atlantic City was incorporated as a city in 1854, but two years previous thereto a survey was made of the high-water line by Mr. Rowland, which water line thus surveyed was utilized by the owners of the soil in making the dedication map of Atlantic City, which is offered in evidence in this case and is marked Exhibit C9. Streets were laid out, those running in the same direction as the general contour of the ocean being named after the oceans, to wit, Pacific Avenue, Atlantic Avenue and Arctic Avenue, and those running at right angles to the ocean being named after the states, beginning at the Inlet or east end of the island with Maine Avenue, then New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, and so on toward the west. At the time of the plotting of the map of 1852, New Hampshire Avenue was mapped and laid out from the bay to the ocean. The distance from Pacific Avenue

along New Hampshire Avenue to the ocean as scheduled on the map was 1450 feet.

The land involved in this suit formed part of a much larger tract which was owned by the Leeds' heirs, and finally vested in Robert B. Leeds, who in July of 1856 conveyed it to John McClees (Exhibit P8).

John McClees, in March of 1858, conveyed a small portion of said lands to Jonah Wootton, described as follows:

BEGINNING in the Westerly side of New Hampshire Avenue 150 feet South from the South line of Pacific Avenue; thence (1) West, parallel with Pacific Avenue, 160 feet; (2) South, parallel with New Hampshire Avenue, 100 feet; (3) East, parallel with Pacific Avenue, 160 feet to the West line of New Hampshire Avenue; (4) North, in and along the West line of New Hampshire Avenue, 100 feet to the beginning. (Exhibit P9.)

McClees' original line began at a point in Pacific Avenue easterly of Vermont Avenue and ran to the ocean, not parallel with Vermont Avenue but deflecting towards the north.

The land lying westerly of McClees' land was owned by Jacob R. Eby, and in January of 1860 McClees and Eby exchanged quit-claim deeds, McClees quit-claiming to Eby a triangular tract beginning in the southerly side of Pacific Avenue and extending from McClees' beginning corner to a point 175 feet distant easterly from Vermont Avenue, which was the middle of the block, said blocks being 350 feet between streets; thence southerly, parallel with New Hampshire Avenue to a point in the line between McClees' and Eby's property. Eby conveyed to McClees a triangular strip beginning in said divi-

sion line of their properties 175 feet easterly of Vermont Avenue, and extending thence parallel with Vermont Avenue to the ocean; thence along the ocean line to McClees' westerly line; thence to the place of beginning.

The effect of these two quit-claim deeds was to vest title in McClees to the land beginning 150 feet easterly of Vermont Avenue and running southerly, parallel with Vermont and New Hampshire Avenues to the ocean, and vesting a like strip of land in Eby. The object, of course, was to square their properties so that their division line thereafter should run parallel to the street system (Exhibit P10).

Exhibits P13 and 14 were for the same lands as mentioned in Exhibit 10.

Between the date of the Eby deed and 1876, the ocean during a succession of storms, washed away the point of the beach and up along the Inlet until the high-water line threatened the United States Government Lighthouse erected on the southerly half of the block bounded by Vermont Avenue on the east, Rhode Island Avenue on the west, and Pacific Avenue on the south. The water encroaching upon that lot at the corner of the east side of Vermont Avenue with the north side of Pacific Avenue. Maine Avenue was entirely submerged. There was no Pacific Avenue easterly of Vermont Avenue, and no lands lying southerly of Pacific Avenue and easterly of Vermont Avenue, and only a small portion of the land lying southerly of Pacific Avenue eastwardly of Maryland Avenue. In fact, the ocean washed all this land away, leaving the contour a circle with a very great radius.

The manner in which the lands were swallowed up was as follows: The northeast storms would carry the surface waters of the ocean high up on the beach,

the tendency of the wind being to hold it there. The waters thus driven up by reason of the strong wind on the surface, would return at the bottom and thus carry the sand into the ocean with them. This undercurrent which cuts away the beach is called the undertow. This process would wash away the lands until it would reach the sand hills, when it would undermine them and the top part would fall into the ocean and it with the rest would be carried away. Each of these storms would wash away 75 to 100, and at times more than 100 feet, of the land, pp. 184-136. After the wind had changed to the west or northwest, the converse became true. The wind would blow the waters away from the beach, which would return at the bottom, and these waters would carry sand with them, which would be deposited on the beach, and gradually make it up. The storms, however, up to 1875 or 1880 were so severe that all the point of the beach was carried away. After 1880 the storms seemed to become less severe, and the beach was made up and has continued to make up until now it is practically where it was in 1852.

After this beach land made up, in March of 1897 McClees conveyed to the Atlantic City Beach Front Improvement Company all his remaining lands by the following description:

BEGINNING in the South side of Pacific Avenue 175 feet East of Vermont Avenue, thence extending (1) East 746 feet more or less to line of Camden and Atlantic Land Company; (2) South, $44\frac{1}{2}$ degrees East by said line 336 feet to Absecon Inlet; (3) South by the high water mark 1024 feet to a point 175 feet East of Vermont Avenue measured at right angles thereto; (4) North, parallel with Vermont Avenue, 650 feet to the beginning.

Excepting the following:

BEGINNING in the West side of New Hampshire Avenue 150 feet South of the South line of Pacific Avenue: (1) West, parallel with Pacific Avenue, 160 feet; (2) South, parallel with New Hampshire Avenue, 100 feet; (3) East, parallel with Pacific Avenue, 160 feet to the West line of New Hampshire Avenue; (4) North, in and along said West line of New Hampshire Avenue, 100 feet to beginning, which land had been previously conveyed to Wootton (Exhibit P15).

In November of 1889, Atlantic City Beach Front Improvement Company conveyed to Henderson, Moss and Hancock a portion of the above-described land, described as follows:

BEGINNING in the South line of Pacific Avenue, 280 feet East of New Hampshire Avenue: (1) East along the South line of Pacific Avenue to the line of lands of the Camden and Atlantic Land Company; (2) South, $44\frac{1}{2}$ degrees East by said line 336 feet to the edge of the Absecon Inlet or Atlantic Ocean; (3) South by the high-water mark to a point 90 feet East of the East line of New Hampshire Avenue if the same were extended; (4) North, parallel with New Hampshire Avenue, crossing Oriental Avenue and Dewey Place to a point 100 feet South of the South line of Pacific Avenue; (5) East, parallel with Pacific Avenue, 190 feet; (6) North, parallel with New Hampshire Avenue, 100 feet to the place of beginning (Exhibit P16).

Henderson, Moss and Hancock, in April of 1903, conveyed a portion of said lands to Roland Conrow by the following description:

BEGINNING in the South line of Pacific Avenue 280 feet East of New Hampshire Avenue: (1) East, along the South line of Pacific Avenue, 120 feet to the West line of Maine Avenue; (2) South, along the West line of Maine Avenue, 460 feet to high-water mark; (3) Extending in line of Maine Avenue extended to a point in the line of high-water mark as it existed in 1856; (4) South, along said line of high-water mark as it existed in 1856 to a point 90 feet East of the East line of New Hampshire Avenue; (5) North, parallel with New Hampshire Avenue, and 90 feet therefrom, to the South line of Dewey Place; (6) East, along the South line of Dewey Place 190 feet. (7) North, parallel with Maine Avenue, crossing Dewey Place, 240 feet to beginning (Exhibit P18).

Roland Conrow in April of 1903 conveyed to the States Avenue Land Company the following tract of land:

BEGINNING in the South line of Dewey Place 90 feet East of New Hampshire Avenue: (1) East, in front or width along Dewey Place, 100 feet; (2) by a length South between parallel lines parallel with New Hampshire Avenue at right angles to Dewey Place 350 feet more or less to high-water mark; (3) still extending oceanward between parallel lines to the high-water mark as the same existed in 1856 (Exhibit P19).

Atlantic City Beach Front Improvement Company, in May of 1900, conveyed to States Avenue Land Company the following:

BEGINNING in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue, being the Southeast corner of a 50 foot street known as Dewey Place: (1) South, along the East line of New Hampshire Avenue, 160 feet to high-water mark; (2) East, by the same to a point 90 feet East of the East line of New Hampshire Avenue; (3) North, parallel with New Hampshire Avenue, 160 feet more or less to Dewey Place; (4) along the South line of Dewey Place 90 feet to the East line of New Hampshire Avenue (Exhibit P17).

These two conveyances vested in the States Avenue Land Company a tract of land beginning in the east line of New Hampshire Avenue and extending easterly at right angles thereto 190 feet, and of that width throughout southerly, parallel with New Hampshire Avenue and in and along the east line thereof to the ocean.

The States Avenue Land Company in December of 1904 conveyed to the Dewey Land Company said tract of land by the following description:

BEGINNING in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue: (1) East, parallel with Pacific Avenue, along the South line of Dewey Place 190 feet; (2) South, parallel with New Hampshire Avenue, 294 feet more or less to the high-water mark of the Atlantic Ocean; (3) Southwest along the high-water line to the East line of New Hampshire Avenue; (4) North, along said line of New Hampshire Avenue 438 feet to the beginning (Exhibit P20).

Dewey Land Company in December of 1907 conveyed to Samuel F. Nirdlinger an undivided one-fourth part as follows:

BEGINNING at a point in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue: (1) East, parallel with Pacific Avenue, 190 feet; (2) South, parallel with New Hampshire Avenue, 294 feet to high-water line; (3) Southwest, along the high-water line to the East line of New Hampshire Avenue; (4) North, along said line of New Hampshire Avenue 438 feet more or less to beginning (Exhibit P21).

Dewey Land Company, in January of 1909, conveyed an undivided one-half interest to Samuel F. Nirdlinger as follows:

BEGINNING in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue: (1) East, parallel with Pacific Avenue, 190 feet; (2) South, parallel with New Hampshire Avenue, 294 feet to the high-water line; (3) Southwest, along the high-water line to the East line of New Hampshire Avenue; (4) North, along the East line of New Hampshire Avenue, 438 feet more or less to the beginning (Exhibit P22).

Dewey Land Company, in February of 1909, conveyed to Nirdlinger an equal undivided one-sixth part as follows:

BEGINNING at a point in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue: (1) East, parallel with Pacific Avenue, along Dewey Place, 190 feet; (2) South, parallel with New Hampshire Avenue 294 feet to the high-water line; (3) Southwest, along the high-water line to the East line of New Hampshire Avenue; (4) North, along the East line of New Hampshire Avenue 438 feet to the beginning (Exhibit P23).

Dewey Land Company, in July of 1912, conveyed its remaining lands to Louis E. Stern by the same description (Exhibit P24).

Samuel F. Nirdlinger, in July of 1912, likewise conveyed to Louis E. Stern all his interest in said lands by the same description (Exhibit P25).

Louis E. Stern, in July of 1912, conveyed to Samuel F. Nirdlinger an undivided one-half interest in said lands by the same description (Exhibit P26).

Louis E. Stern, in July of 1912, conveyed to Dewey Land Company an undivided one-half interest in said lands by the same description (Exhibit P27).

Dewey Land Company, in February of 1914, conveyed to Samuel F. Nirdlinger its one-half interest in said lands by the same description (Exhibit P28).

Defendant's title is founded upon two conveyances from Atlantic City Beach Front Improvement Company to William H. Burkhard, dated November, 1898, and the land is described as follows:

BEGINNING at the Northwest corner of New Hampshire and Oriental Avenues, said point being 400 feet South from the Southwest corner of New Hampshire and Pacific Avenues: (1) West, in the North line of Oriental Avenue, 175 feet; (2) North, parallel with New Hampshire Avenue, 150 feet; (3) East, parallel with Oriental Avenue, 175 feet to the West line of New Hampshire Avenue; (4) South, along the West line of New Hampshire Avenue, 150 feet to the beginning.

BEGINNING at the Southwest corner of New Hampshire and Oriental Avenues; thence (1) West, by Oriental Avenue, 175 feet; (2) South, at right angles to Oriental Avenue, 50 feet more or less to the high-water mark of the Atlantic Ocean; (3) East, by the same, 188 feet to the

West line of New Hampshire Avenue; (4) North by the same 24 feet more or less to the beginning (Exhibits D4, also D1, pages 91 and 92).

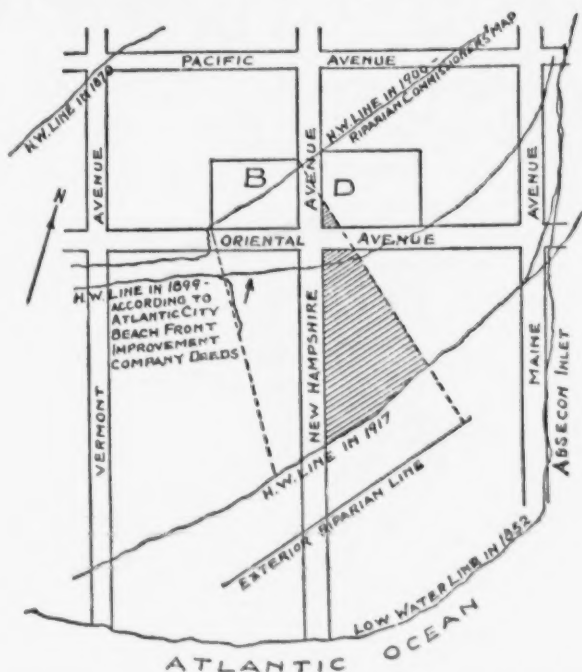
William H. Burkhard conveyed the lands to William H. Bartlett and Elwood S. Bartlett in November, 1899, by the same description, calling for New Hampshire Avenue as a boundary.

Bartlett conveyed to Stevens in April of 1905 by the following description:

BEGINNING in the West line of New Hampshire Avenue 250 feet South of Pacific Avenue; (1) parallel with Pacific Avenue, 160 feet; (2) north, parallel with New Hampshire Avenue, 100 feet; (3) West, parallel with Pacific Avenue, 15 feet; (4) South, parallel with New Hampshire Avenue and Vermont Avenue, 250 feet to the North line of Oriental Avenue; (5) parallel with New Hampshire Avenue and Vermont Avenue, crossing Oriental Avenue and the high-water line to the exterior line of commissioners; (6) then following the riparian grant to the place of beginning (Exhibit D6).

The *locus in quo* consists of a triangular tract of land lying on the easterly side of New Hampshire Avenue, in front of the fast land of plaintiff, lying on the said ~~westerly~~ ^{easterly} side of New Hampshire Avenue. It is claimed by the defendant as accretions to his land, whose fast land lies upon the Westerly side of the same avenue. The hatched portion of the following map, copied from the opinion of Judge

Haight in the United States District Court (262 Fed. page 595) shows the land in dispute.



All the regained land, including the lands hereinabove described were sold by McClees and by the purchasers, has been divided into lots with the lines running parallel to the streets, and sold to numerous persons, a large part of which land has been mortgaged by similar descriptions, there being on record for the lands lying southerly of Pacific Avenue and easterly of New Hampshire Avenue 106 conveyances. There are of record for the lands lying southerly of Pacific Avenue and between New Hampshire Ave-

nue and Vermont Avenue at least 200 conveyances, all of which conveyances excepting three or four are described as running parallel to the street system. Of these three or four, two are accounted for by the quit-claim deeds between McClees and Eby, and one by the riparian grant to Stevens.

On the portion of land lying southerly of Pacific Avenue and easterly of New Hampshire Avenue, touching which there are 106 conveyances of record, there are 70 mortgages; and on the tract of land between Vermont and New Hampshire Avenues lying southerly of Oriental Avenue there are 85 mortgages. The aggregate amount of the 70 mortgages covering the land south of Pacific Avenue and east of New Hampshire Avenue is \$573,957.00. On the block of land lying easterly of New Hampshire Avenue and northerly of Pacific Avenue there are 102 conveyances of record, and since 1900, mortgages have been placed on that land aggregating \$1,430,000.00, and the value of the real estate covered by the mortgages is much greater.

From the Inlet to Albany Avenue southerly of Pacific Avenue, the boundary lines of practically all of the conveyances run at right angles to the street system. All of the large beach front hotels and hundreds of cottages and stores lying easterly of South Carolina Avenue are built upon lands that have been made by accretion. These hotels include the Chalfonte and Haddon Hall at the ocean end of North Carolina Avenue, the Strand and Seaside at the ocean end of Pennsylvania Avenue, the St. Charles at the ocean end of St. Charles Place, the Breakers at the ocean end of New Jersey Avenue, and the Royal Palace at the ocean or inlet end of Pacific Avenue. p. 166.

The high-water line of the Atlantic Ocean did not

run parallel with Pacific Avenue, and the property lines if extended at right angles to the high-water line would all deflect from the course of the streets running to the ocean.

Defendant claims that the *locus in quo* is accretion to defendant's lands, and that the easterly boundary line thereof should run obliquely to and across New Hampshire Avenue and across the lands on the easterly side thereof, basing his argument either upon the dictum of Judge White in the Dewey Land Company case, or else upon the common law theory that accretions should be apportioned by drawing a line at right angles from the thread of the stream to the side boundary lines of the owner's fast land.

As to the first contention, it is sufficient to say that the Riparian Commissioners of the State of New Jersey have no authority over lands, or to fix the boundary lines of lands, above the high water mark. They have an absolute authority to fix the lines of lands granted or leased by them under water, but their authority terminates with the high water mark. *New Jersey Statute* and *Polhemus v. Bateman* (60 L. 163).

The second contention is said to be based upon equity, to wit, that the man owning lands bounded by navigable waters, being always in danger of losing them by the action of the waters, shall, as compensation, have the lands gained by accretion.

The inequity of the present case is found in two facts—first, the defendant claims not his land that was lost by erosion or avulsion, but the land of his neighbor. His fast land lies upon the westerly side of New Hampshire Avenue, and because the high water line at that point happens to curve to the left or north, he claims that he is entitled to extend his lines across New Hampshire Avenue to the easterly

side thereof, and take as his accretions, land lying in front of plaintiff's land lying on the easterly side of that avenue.

The second erroneous contention is admitting the common law rule applied in some of the cases, that the accretions should be apportioned by drawing a line at right angles from the thread of the stream to the side line of the owner's fast land. Nobody in this case has determined the course of the thread of the stream. The thread of the stream means the channel. This land lies along the Atlantic Ocean. Which one of the hundreds of channels or currents in the ocean does defendant adopt? The trial Court found none, and it is respectfully submitted that no Court will determine which of the hundreds of currents constitutes *the* current or the channel, without evidence touching the matter.

Plaintiff contends that the accretions are the lands made up by the action of the ocean within the side lines of the respective properties, and that the accretions of plaintiff in the case at hand are those lands that have been added by the imperceptible deposit of the ocean between the extended side lines of plaintiff's property, to wit, the easterly line of New Hampshire Avenue, on the one side, and a line parallel thereto and 190 feet easterly therefrom, on the other.

Plaintiff claims the *locus in quo* is accretion to its lands upon the theory that accretions are divided on an equitable basis, and nothing can indicate more clearly how inequitable it would be to divide them upon the basis of defendant's claim, than is shown by the map of the *locus in quo*.

A reference to the map will show that by reason of the ownership of a triangular strip of land, having its apex in the westerly line of New Hampshire

Avenue, a width parallel with Pacific Avenue of 175 feet and a depth parallel with New Hampshire Avenue on one side of 50 feet, defendant contends he is entitled to the accretions of practically the whole of the land lying within the lines of his original grant extended parallel with the westerly side of New Hampshire Avenue to the ocean, and in addition thereto to practically one-half of the lands of Nirdlinger, being 190 feet on Dewey Place and of that width extending to the ocean, and in addition thereto to a portion of the lands lying easterly of the Nirdlinger lands.

If the Court should hold that the line of accretions should take this oblique course, then neither complainant nor defendant have title to the fast lands on which they base their right to accretions. The undisputed testimony shows that about 1875 the Atlantic Ocean had washed in and over all of the lands now in question and up to the intersection of Vermont and Pacific Avenues. All the lands of McClees at that time were submerged lands, and if the title to the new lands formed by accretion is to be run obliquely, then there is no evidence of title in McClees nor in either complainant or defendant.

The testimony of Walter Somers, page 75, is as follows:

“Q. Mr. Somers, these northeast storms, these are what do damage to the beach?

A. Yes, sir.

Q. They cut it in how much sometimes at a time?

A. Well, late years it don't wear away very much because they have these jetties all along there.

Q. I don't mean that, I mean in former years when it was way up there so far, it was cut in

how much, 100 feet, 200 feet at a time, wouldn't it?

A. I couldn't tell exactly but I know some mornings we would get up and the beach all washed away in one night."

At page 101 Joab Higbee testified:

"Q. And heavy storms make great inroads in them, don't they?

A. Yes, sir.

Q. Sometimes cut away 100 or 200 feet in one storm?

A. I have saw it cut away 50 or 75 feet in a storm. Sat there and looked at it and see the easterly tide, when a swell come in there, cut the sand, roll down there—it would roll down in twenty-five carloads to one sea (wave).

Q. And the next swell came in, just took that out to sea and that's the last you ever saw it?

A. Washed it right down this way, to the southwards all the time."

At page 112, James Mills testified:

"Q. Captain, the timber that grew on Absecon Beach was red cedar, wasn't it?

A. Yes, sir, red cedars, hollies, briars and everything.

Q. And it was the common thing to set houses on red cedar piling, wasn't it?

A. They did.

Q. And red cedar was a good deal easier to get down there than brick?

A. Well, there wasn't so many of them till you got down to the beach.

Q. There were plenty on Absecon Beach?

A. Down towards Longport, yes.

Q. Well, there were some, weren't there, up at Vermont Avenue?

A. Well, I will tell you how many cedars at Vermont Avenue, tell you where they started from.

Q. How many were there?

A. Well, I tell you, there was two hills, you understand. One ran from Vermont and Railroad Avenue and the other ran from Vermont and Atlantic down what they call Sharp's—Mr.—was talking about the hills washing away and the cedar trees falling. I stood there a day and seen them falling myself.

Q. That was during severe storms you would see them fall down?

A. Why, yes, sir, a northeast storm would cut them down, yes, sir.

Q. And, of course, would cut the other part of the beach as well, didn't just stop right there?

A. Washed it away, yes, sir.

Q. I think that's all, Captain."

At pages 98 and 99, Alfred Smith testified:

"Q. How much have you known these storms to cut in the beach either on Absecon Beach or on Brigantine Beach, a single storm there, how many feet have you known to be washed away?

A. That would depend on places; where high hills were up I have known it to cut in there quite a distance, probably ten or twenty feet, undermine the hill, then it would drop down.

Q. And you could see that when it was cut—you could see the hills fall in and see it wash out?

A. Yes, sir.

Q. Now, have you ever seen the storms undermine the trees on Absecon Beach?

A. I never did see it, I know it has been done."

At pages 93 and 94 Thomas Horner testified:

"Q. Do you remember when what is now the point of the beach, the land below Pacific Avenue and easterly of New Hampshire Avenue, was wood?

A. There used to be high cedar trees there, a big bluff.

Q. Now, were you ever there when there was a storm and saw those trees fall in?

A. I have seen them after they have fell in.

Q. After they have fallen in?

A. Yes.

Q. Have you ever been there when there was a storm and seen the sand hills fall in?

A. Oh, yes, lots of times.

Q. Captain, would that be occasioned by the water cutting in under them?

A. That come in under the beach, undermined the trees and they would fall over into the surf.

Q. But you couldn't see the cutting process?

A. No, you couldn't see that.

Q. That's all."

Whether the Court will find that this land was lost by avulsion or whether it finds it was lost by erosion, in our opinion leads to the same ultimate result, only upon different theories. If it was lost by avulsion, then plaintiff's predecessor in title never entirely lost his interest in the land, even though it was for a time covered by the Atlantic Ocean. It

is admitted and stipulated that it was regained by accretion. If it were lost by erosion, then all title to plaintiff's predecessor in title to the land under water vested in the state. If it was lost by avulsion, plaintiff's predecessor in title did not lose his entire interest in the land, but when it reappeared by accretion, it became his land, according to the original boundaries. In re: *City of Buffalo* (206 N. Y. 319—99 N. E. 850); *Mulrey v. Norton* (100 N. Y. 424—20 Law Ed. 939); *Shriver v. Ocean City Assn.* (64 N. J. L. 550); *DeLancy v. Wellbrock* (113 Fed. Rep. 103-105); *Stockley v. Cissna* (119 Fed. 812).

If the land was lost by avulsion, plaintiff's predecessors in title not having lost his entire interest in the land under water, when he made a conveyance of the land above water, bounding it by the high water mark, conveyed all his interest under the high water mark within the side lines of such conveyance. *Banks v. Ogden* (2 Wall. 57—17 L. Ed. 818), wherein Chief Justice Chase said:

“That a grant of land bordering on a road or river carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent to the exterior line.” *Salter v. Jones* (39 N. J. L. 469).

If the land was lost by erosion, and the title thereupon vested in the state, when the accretions appeared, if they are apportioned as hereinafter contended for by us, and as the District Court and Circuit Court of Appeals found, then plaintiff would be entitled to the accretions within his side lines, extended precisely as in the case if the lands were lost by avulsion.

In the case of *Jefferis v. East Omaha, &c.* (134 U. S. 178—33 L. Ed. 872), in which the United States Government made survey of land to a patentee lying on the southerly side of the Missouri River, and after the survey had been made, but before the patent was granted, considerable land was made by accretion, this Court held that the lands made by accretion would be included in the patent within the original side lines to the southerly line of the Missouri River. The Court in conclusion saying:

“But we think that in all the deeds, the accretion passed by the description of the land as lot 4. In making every deed, the grantor described the land simply as lot 4, and did not, by his deed, nor does it appear that he has since or otherwise, set up any claim to any accretion. It must be held, therefore, that each grantor, by his deed, conveyed all claim not only to what was originally lot 4, but to all accretion thereto. When McCoid, in 1854, conveyed his interest in the premises by the description of lot 4, as he had taken a deed of the undivided half of the premises by the same description from Joseph I. Town, in September, 1857, and had title thereby up to the river, his north line was the river, which was gradually adding land to his land.

“These views result in the conclusion that the side lines of lot 4 are to be extended to the river, not as the river ran at the time of the survey in 1851, but as it ran at the date of the patent in 1855, and that all the land which existed at the latter date, between the side lines so extended and between the line of the lot on the south and the river on the north, was conveyed by the patent.”

Widdowson & Rosenmiller 118 F. 295

After the lands reappeared, McClees repossessed himself of them, and to this day no person has ever questioned his title thereof.

McClees conveyed his title to the Atlantic City Beach Front Improvement Company, with the exception of one tract previously conveyed to Wootton, and by successive conveyances his title to the fast lands has passed to complainant and defendant through respective deeds, both being bounded by New Hampshire Avenue.

New Hampshire Avenue was laid out on the map in 1852 or 1854, at which time the land now in question was high, fast land, and as early as 1858 a conveyance was made by McClees to Wootton of a tract of land bounded on the east by New Hampshire Avenue. All the conveyances by the respective owners of the lands on either side of that avenue have been conveyed with respect to that avenue as one of the boundaries, so that the avenue has been recognized as a division line between property for the past sixty-five years theoretically, and for the past fifty-nine years by actual conveyance (Plaintiff's Exhibits 9 to 28; Defendant's Exhibits 1, 4, 6).

If the *locus in quo* be considered as lands formerly above the high water lost by avulsion that were for a time submerged and have again reappeared, then the conveyance to the defendant having New Hampshire Avenue as its boundary, and the conveyance to the complainant having New Hampshire Avenue for one of its boundaries, New Hampshire Avenue will continue the dividing line between those properties.

If, on the other hand, the lands be considered as accretions, then there has been such a manifestation of intention by the owners to constitute New Hampshire Avenue a division line between them that it

would now be inequitable for the Court to fail to give it effect.

In this connection the following observations of Judge White in the Dewey Land case are important. He says:

“If complainants have any title to the *locus in quo*, it must be by virtue of its being an accretion to their high land on the east side of New Hampshire Avenue, and the efficacy of such a claim of title would necessarily depend upon whether the owner of the former fast land, as it existed in 1853, in then dedicating and opening a public street, New Hampshire Avenue, across the same, to and at right angles to the ocean, had so divided his land into two parts, and fixed the natural side lines of accretion gains for those parts respectively as to have rendered it inequitable for the state to have disregarded the lines so fixed in making its subsequent survey and grant. *Valentine v. Piper*, 22 Pick. 95. But, as before stated, that question is not in my judgment involved in and is therefore not decided by this case.”

This principle is brought out with great force in *Valentine v. Piper*, 22 Pick. 85, and is reaffirmed in *Piper v. Richardson*, 9 Metcalf, 155, and *Drake v. Curtis*, 9 Cush. 446, where the doctrine of the previous cases that the owner had previously laid out the property with reference to the lines of a street, was held to be sufficient reason for extending the lines of the lots on either side of the street parallel thereto. See also *Commonwealth v. City of Roxbury*, in the note to 9 Gray, 523, as well as *Gerish v. Gary*, 120 Mass. 132; *Adams v. Wharf Co.*, 76 Mass. 521, and *Attorney-General v. Boston Wharf Co.*, 78 Mass. 553.

The testimony shows all of the land in this vicinity to be of the same character as the *locus in quo*, and if it be considered as accretion, there have been more than three hundred conveyances all running parallel with or at right angles to the street system. In all these conveyances not a single owner has asserted claim to title except in front of his property, that is, within the limits of the side lines of his lot extended.

This accreted land, and the buildings erected thereon, from the evidence must be of the value of several millions of dollars.

In addition to the successive conveyances from grantor to grantee, of all of those lands during all the past forty or more years, there have been practically two hundred mortgage liens created on this same land. All of these liens have likewise been for tracts of land running parallel to or at right angles to the street system, and the present amount of these mortgages, according to the testimony, exceeds \$2,000,000. So that in every conveyance by grantor to grantee, or from mortgagor to mortgagee, the parties have dealt with these accretions as though the accretions were formed in front of their lots within the side lines of their lots extended. Their successive conveyances and mortgages show conclusively their intention as to the manner in which these accretions should be divided.

In the case of *Dawes v. Prentice*, 33 Mass. 435, the intention was gathered from one of the courses in the deed, as was the case in *Smith v. Smith*, 100 Mass. 302, and *Stockham v. Browning*, 18 N. J. Eq. 390. In the present case such intention is to be drawn from the courses in the successive deeds of all the grantors for all the land in this vicinity, hence complainant contends that the Court will award

this accreted land in the same manner that all these owners have dealt with it. To make a different decree will mean to unsettle all the real estate and mortgage titles to all the land in this vicinity, and elsewhere along the Atlantic City ocean front, including the land on which is erected the Royal Palace Hotel, the Breakers, the St. Charles, the Seaside, the Strand, the Chalfonte and Haddon Hall (page 166).

To decree that these accretions are to be apportioned obliquely would mean to cast a cloud upon every title and upon every mortgage not only in the section of Atlantic City where the *locus in quo* is situate, but also upon all the ocean front properties in Atlantic City, as there is evidence to show that all the land along the ocean front is accretion (page 166), and that the high-water mark did not run parallel with Pacific Avenue or at right angles to the cross streets, and that all the conveyances and mortgages have been made either at right angles or parallel to the street system (page 261, line 10). Not only should the title be apportioned in conformity with the conveyances made by the owners of the property, but it is contended as a matter of law that accretions can never cross a street where there is a private owner on both sides of it.

In the opinion of Judge White it was suggested that a Court might follow the line of the riparian grant in apportioning accretions. The opinion was not necessary to the case, in fact it was not even a *dictum* because accretions were not involved in that case, and both opinions rendered in the case expressly exclude the accretions therefrom.

In answer to defendant's like contention, it will be recalled that the riparian commissioners have no authority except such as is conferred upon them by

the acts of the legislature concerning riparian grants. Their duties are confined to lands covered by water. They have no authority over lands above the high-water mark. In other words, the riparian commissioners have no jurisdiction over accretions, and by no possibility could their determination, if they attempted one, have any binding force upon a court.

An examination of the record in the case of *Dewey Land Company v. Stevens*, which is in evidence, will disclose the fact that there is nothing in it whatever to justify the statements in this part of Judge White's opinion, to the effect that the riparian commission have adopted any system, equitable or otherwise, in making their grants, or forming a basis for the conclusion he reaches that there should be equitably some similarity between the lines run by them in attempting to make their grants, and the lines to be established for accretion. In fact, the very grant made by the commissioners in this, as in all other cases, is expressly bottomed upon the assumed ownership of the upland in the applicant as contiguous to the granted territory in the direction indicated in the grant.

The right of accretion is not a mere illusory right, but a real one.

Under our Act of 1869 it is provided that a grant may be made to a person other than the owner, provided six months previous notice be given to the owner of the ripa. As a means of testing the statement of Judge White, suppose A, being the riparian owner, and under the Act of 1869, a riparian grant be made to B, in front of A's land; on A's riparian grant he gets no exclusive right of possession unless he reclaimed the land. Suppose he does not reclaim the lands and accretions form within the limits of

the riparian grant, yet in front of A's land. There can be no question but that those accretions would be the property of A, and yet under Judge White's suggestion, B would have title to them by virtue of the bounds of his riparian grant.

In fact, in the riparian grant to Bartlett, the riparian commissioners recognized the course running parallel with the street in the Burkhard and Bartlett deeds for the upland. The record shows that Burkhard acquired title by two deeds: One running from Dewey Place to Oriental Avenue; the other for lands northerly of Dewey Place, and conveyed to Bartlett. After acquiring this title, almost the entire tract first above mentioned became submerged and was submerged at the time of the making of the grant, yet the riparian commissioners ran their first course along the original westerly line of the Burkhard or Bartlett land, the first course in the riparian grant being as follows: "And from said beginning point south parallel with Vermont Avenue, 175 feet east at right angles from the east line of the same, 185 feet to a point in the east line of lands under water;" thence southeast in a straight line.

If the riparian commissioners intended to establish a rule that the line should be at right angles to the shore line, then the first course of the Bartlett grant should have been laid southeast from the beginning, and they should not have gone 185 feet parallel with Vermont Avenue before adopting the southeast course, so that the riparian commissioners have not followed what defendant contends should be the rule.

If title to the accretions was dependent upon the courses of the riparian grant, then by the act of the riparian commissioners in starting their first course

at right angles to the shore line from the beginning corner, would deprive the adjoining owner on the west of a considerable amount of accretions, because a line drawn southeast from a point 185 feet south of the beginning corner and 175 feet westerly of Vermont Avenue would be very much further west than a line drawn from the beginning corner southeast to the exterior line.

RIPARIAN GRANT WAS INEFFECTIVE.

Defendant showed title from a common grantor to a parcel of upland lying on the westerly side of New Hampshire Avenue, produced a riparian grant under the great seal of the state covering the *locus in quo*, and then by his brief contends that he has made out a *prima facie* case.

The defendant, however, did not in the trial of the case stop with the offering of his two deeds, but offered eight or more witnesses who testified that the ordinary high-water mark of the Atlantic Ocean about 1875 was very much further inland than at the present time, their testimony placing the high-water mark at or near the intersection of Vermont and Pacific Avenues, their testimony being to the effect that all easterly of that location, which included all the lands of complainant and of defendant, were then under the waters of the Atlantic Ocean. His witnesses, on cross-examination, uniformly testified that the ocean during severe storms made inroads upon the beach, washing it away from fifty to seventy-five feet during a single storm, and after the storm subsided the land would gradually reform, but before the regained land would equal the amount that had been previously carried away by the storm,

another storm would appear and make still further inroads into the beach; that this continued until after 1875.

There is undisputed testimony that in 1874 and 1875 a jetty was built into Absecon Inlet, called the Government Jetty, and soon thereafter the gains became more lasting. One of the witnesses, named Horner, testified that no gains were made, however, to the beach until three or four years after the jetty had been built; that for two or three years thereafter the beach continued to cut away.

The only fair inference to be drawn from the undisputed testimony concerning this jetty is that the building of the jetty had a tendency to divert the current from its previous channel. This could not be done all at one time but was done gradually, and as this current was diverted from its previous channel and formed a new channel further towards the north, it gave nature an opportunity to reform the beach.

The process of formation was clearly stated by Barclay Bullock, who testified that the heavy northeast storms dashing against the beach loosened the sand, and the weight of the wind on the water forced the water ahead of it up on the beach, and as the water must go some place and would not go back against the wind, it went to the bottom forming an opposite current from that above, and the bottom current being away from the beach, carried the loosened sand with it, thus making the inroads as above stated of anywhere from one to three hundred feet during a single storm. When these northeast storms would die down and the wind would blow from the west or northwest, the weight of the wind would carry the water out to the ocean, and the water being bound to find its level, caused an under-current to set in the opposite direction towards the

beach, and this undercurrent carried the loose sand with it, depositing it upon the shores of the beach, and thus forming the accretions that admittedly have been formed in this section.

During the course of the trial it was agreed by both complainant and defendant that the lands made up were made by the gradual increase from the ocean, and were accretions. Admitting then that defendants were in possession of the upland portion of their lots at the time the riparian grant was made, and admitting, without conceding, that the riparian grant was a valid grant at that time, it conclusively appears that since that time the accretions have formed and a considerable portion of the original grant, to wit, the *locus in quo*, has been covered by accretions, so that these lands now lie above the high-water mark, and on the opposite side of the street from that on which defendant's fast lands are located, and belong either to the plaintiff or defendant.

It is contended by the complainant that as these lands are now above the high-water mark and were formed by accretions, that defendant retains no title thereto by virtue of his riparian grant. It is further contended that the lands are accretions to complainant's lands in front thereof, and are entirely free from defendant's riparian grant. In other words, it is contended by complainant that the inland line of a riparian grant is ambulatory, and just as land makes up by accretions and excludes the water therefrom, just so is the land conveyed by such a riparian grant lessened in quantity and lost to the holder thereof.

It was said in the case of *Dewey Land Company v. Stevens*, 83 N. J. Eq. 314, that notwithstanding this riparian grant, if at the time it was made

“the land did not belong to the state, its grant was ineffective; if the land belonged to the state

at the time of the grant by reason of then being under tide water, but has reverted to its former owners by matters arising after the grant, the complainants are not in a position of questioning the grant, but of conceding its validity, and claiming that the title thereby granted has ceased to be effective."

This is precisely the position of the plaintiff. Assuming, but not conceding, that the riparian grant was properly described and legally made, our contention is that the only title the state could give when it made the grant was such title as it possessed and owned, which was the title to land under water, the inland boundary of which was ambulatory. In other words, the title of the state insofar as it is bounded by the high-water mark is subject to the shifting and changes occurring by the slow process of accretion and its correlative reliction. The right of the state to the lands under tide waters up to high-water mark is the precise equivalent of the right of the Crown in England to the same kind of property, and it is perfectly well settled in both England and this country, that as between the Crown, or the state, and the private owner, the rights of the former in case of gradual and imperceptible recession or accretion are shifting and will be delimited by the high-water mark. This familiar rule is thus expressed in *Gould on Waters*, Section 105:

"Land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made. There is no distinction in this respect between soil gained by accretions and that

uncovered by reliction. The change is imperceptible when it is not discernible in its progress, though the fact that there has been an increase may be perceptible year by year, or at shorter intervals. Conversely, land gradually encroached upon by navigable waters ceases to belong to the former owner. The external bounds of estates situated upon the shore of the sea or navigable rivers may thus gradually shift as the water recedes or encroaches, although the right to the shore itself of course remains in the Crown or state."

The title of the state to high-water mark being thus a shifting one, dependent upon the gradual change in the position of high-water mark due to accretion, any one who takes title from the state to land under water of course takes such title subject to the same contingency of change or shifting in the boundary line. The state can give nothing more than it owns.

The situation is characteristically described by Judge Depue, delivering the opinion in the Court of Errors and Appeals in *Ocean City Association v. Shriver*, 35 Vr. 550-553, where he states:

"The avenue as delineated on the map is a fixed monument in the description in the deed and in that respect it differs from a boundary on the ocean, where, by force of the description itself, the title of the grantee will advance or recede as the line of the high water changes from time to time, and he will hold by the same boundary, including the accumulated soil that has arisen from alluvial formations. *Scratton v. Brown*, 4 Barn. & C. 485; *Rex v. Yarborough*, 3 Id. 91; *S. C. H. L. sub nom. Gifford v.*

Yarborough, 5 Bing. 163; Camden & Atlantic Land Co. v. Lippincott, 16 Vr. 405."

The case of *Scrutton v. Brown*, 4 B. & C. 485, is directly in point. It was an action of trespass brought by the owner of shore lands, claiming under a grant from the Crown, against persons who had taken stone therefrom. The grant in question was between high and low-water mark as it existed in September, 1773. Since the date of the grant there had been a shift by imperceptibly slow changes in the location of low-water mark, and the question in the case was whether the title derived from the grant between high and low-water mark was only to such territory as lay between those points in 1773, when the grant was made, or whether the fact of accretion, or its correlative, was to change the location of the property to the land between low and high-water mark as at present existing. It was argued:

"Then assuming that the deed conveyed a right of soil in the shore, it conveyed such right in that portion of land which from time to time should constitute the seashore, and not merely in that portion of land which constituted the seashore in 1773. It has been said that there cannot be such a thing as a movable freehold, and that this grant is void for uncertainty. But in Co. Litt. 48 b. it is laid down that where a person has a movable estate of inheritance in thirteen acres of land, parcel of a meadow of eighty acres, he may convey it by the description of thirteen acres lying within the meadow of eighty acres. That is an authority, therefore, to show that there may be a movable freehold, and that the description in the present case is sufficiently certain. The uncertainty in the

description, if any, arises wholly from the uncertainty of the subject-matter granted. Then, if there may be a movable freehold, and it is sufficiently described, the question is what was intended to pass. Now, it is clear, from the whole deed, that the grantor intended to part with all his interest in the shore which he himself had derived from the Crown. According to the late case of *The King v. Lord Yardborough*, 3 B. & C. 91, and the passages from Lord Hale's treatise *De Jure Maris*, there cited, it is established that land formed by the sea, by slow, gradual, and imperceptible accretion, *prima facie* belong to the Crown, as the shore, or the space between high and low-water mark, has been slowly and imperceptibly altered by the encroachment of the sea, the shore so altered would belong to the Crown, and of course to its grantee, and, therefore, now belongs to those who claim under the deed of 1773."

Upon this point Judge Bayley said:

"There is no dispute as to the limits on the east and west, but merely as to those on the north and south. It has been contended on the part of the plaintiff, that it does not convey that soil which from time to time is bounded by the high and low-water marks, but only that soil which at the time when the deed was executed was bounded by the then high and low-water marks. Now the passage cited from the 1st inst. 48 b., shows that there may be a movable freehold. It does not apply specifically to this case, because the case put there is of a given quantity of land fixed in situation, of which part from time to time may be vested in A and the other

part vested in B. The question here is, whether there may be a certain quantity of land shifting in situation and vesting in the same person at different times? That must be the case of land fronting the sea or a river, where, from time to time, the sea or river encroaches or retires. *If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore there belongs.* The land between high and low-water marks originally belonged to the Crown, and can only vest in a subject as the grantee of the Crown. The Crown by a grant of the seashore would convey, *not that which at the time of the grant is between the high and low-water marks, but that which from time to time shall be between these two termini.* Where the grantee has a freehold in that which the Crown grants, his freehold shifts as the sea recedes or encroaches. Then what was the object? Then what was the object of the parties to the deed of 1773? To grant the land within certain limits? Those to the east and west were ascertained, but those on the north and south were to be ascertained by the high and low-water marks. I think that those words must be construed with reference to the rules of the common law upon the subject of accretion, and that as the high and low-water marks shift, the property conveyed by the deed also shifts. For these reasons I am of opinion that the plaintiff was not entitled to recover in respect of any part of the stones which were proved to have been taken between high and low-water marks."

It was because of the distinction between a slow and gradual growth by accretion rather than by sud-

den avulsion that the verdict was sustained in the leading case of *King v. Yarborough*, 3 B. & C. 91. Attention is directed to the very able argument of Phillips that precedes the opinion in the case, where he thus expresses the idea:

"The true and only sensible meaning, is that where the increase is imperceptible in its progress, then the land becomes the property of the subject as it is formed; it is then vested in him *de die in diem*; and what is once vested in him cannot be divested by the circumstances of a still further increase afterwards taking place."

This case of *Scratton v. Brown*, *supra*, is referred to approvingly by Chancellor Runyon in *Nixon v. Walter*, 14 Stew. 107. So Judge Depue, in the leading case of *Camden & Atlantic Co. v. Lippincott*, 16 Vr. 405, had occasion to construe a deed, one course of which called for a boundary to and along "the storm tide mark of the Atlantic Ocean," and at page 415 says:

"A more uncertain and vacillating boundary than that adopted for the seaward line in the Miles deed could not be devised. It cannot be taken as an absolute—a fixed—boundary. It must be treated as relative, and as having relation to the condition of things as they are from time to time."

He then refers approvingly to *Scratton v. Brown*, *supra*, as "the leading case on this subject"; and in the same manner refers to *In re Hull & Selby R. Co.*, *infra*, as well as *Dunlop v. Stetson*, 4 Mason, 349, where Judge Story refers approvingly to *Scratton v. Brown*. Judge Depue also cites *Adams v. Frothingham*, 3 Mass. 352, and *Phillips v. Rhodes*, 7 M & C., 322, and adds:

“The principle on which these cases were decided is that in grants of lands lying along the seashore, the parties act with a knowledge of the variety of changes to which all parts of the shore are subject. The grantee takes no fixed freehold but one that shifts with the changes that gradually take place. The proprietor of lands having such a boundary is obliged to accept the alteration of his boundary by the gradual changes to which the shore is subject. He is subject to loss by the same means that may add to his territory; and as he is without remedy for his loss, so he is entitled to the gain which may arise from alluvial formations, and he will, in such cases, hold by the same boundary, including the accumulated soil. Tyler on Bounds, 40; Phear on Waters, 12-43; 3 Kent. 435; New Orleans v. United States, 10 Pet. 662-717. He takes his title, as was said by Mr. Justice Story in Dunlop v. Stetson, subject to those common incidents which may increase or diminish the extent of his boundaries.”

See also *In the Matter of the Hull and Selby Railway*, 5 M. & W. 328. Here it appears that by gradual and imperceptible progress the tides had encroached upon what was formerly the foreshore of a river, and a railroad company, under its charter, had constructed its line across a portion of the property which had been so gradually encroached upon, and the question was whether the condemnation moneys should be paid to the Crown or to the owner of the former foreshore. Lord Abinger says:

“It is admitted, that as between subject and subject, the law as to gradual accretion is settled by the cause of Rex v. Lord Yardborough.

The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law, for the permanent protection and adjustment of property. It is different, indeed, where the change occurs by a sudden advance or recession of the water. In Scotland, a river containing a valuable salmon fishery belonging to the present Lord Chief Commissioner Adam, was suddenly transferred to the land of his neighbor. Afterwards, by another equally violent effort of Nature, the river returned to its former channel; but in neither case did the owner of the bed of the river lose his right to the soil. But in all cases of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added, and vice versa. This is the rule as between subject and subject; but it is said to be different as between the Crown and subject. But Sir F. Pollack says we all hold by grant from the Crown: Then the Crown holds by the same rights, and with the same limitations as its grantee. This being then the case of a gradual access of the water, it makes the land now between high and low-water mark the property of the Crown. No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property. The money therefore, must be paid to the Crown."

In *DeLancey v. Wellbrock*, 113 Fed. Rep. 103, 105, we find:

"With that construction, the next question is

the location of that tract upon the soil. The in-shore boundary is the common high-water mark. There is no indication of any cataclysm that has taken place, making an extraordinary change there. Whatever shifting there has been in or out of the shore line has been only gradual and normal in its character. The evidence points that way. Under those circumstances, it seems to me the rule laid down in *Scrutton v. Brown*, 4 Barn. & C. 485, and which is approved in *Trustees v. Kirk*, 84 N. Y. 215, 38 Am. Rep. 505 is the rule to be applied, that where the Crown grants a subject the soil to such an extent as that the shore itself may shift by entirely natural causes, without any earthquake or anything extraordinary, by the operation of accretion and erosion. Thus, under the circumstances, at one time the grantee of a strip like this might gain land towards the shore, but he would not gain on the whole, because the more he gained inshore by the shifting boundary the more he would lose by his outer boundary, and he would not get any more than 400 feet. And, per contra, he might lose from the land inside, and as long as his 400 foot line did not take him beyond the ownership of the soil of the State he would not lose on the whole, because it would shift his outer line out, though he might lose even then, because there might be no place for his outer line to go. I am of the opinion, therefore, that the common high-water mark as it stood at the time of the commencement of this suit, or thereabouts, is to be taken as the inshore boundary, from which the 400 feet are to be measured off; and, that being so, clearly the premises which are described in the complaint

are within the boundary of this particular grant. That being so, the next question that arises is, what is the effect of the subsequent deed of the Commissioner of the land to Wellbrock? I have gone over these cases (*DeLancey v. Piepgrass*, 138 N. Y. 26, 33 N. E. 822, and *Same v. Hawkins*, 23 App. Div. 8, 49 N. Y. Supp. 469), and it seems to me that the controlling point of view is just this: The State granted a fee. That has been held by the Court of Appeals. It granted a title in fee to the land under water—that 400 foot strip—to Palmer, and again, through the comptroller's deed, to Hunter. There was an easement reserved on it, an easement that the people possessed of navigating over it and anchoring and fishing; an easement that the State possessed over land covered with water, where the soil belonged to a private owner and the water was navigable. It is not necessary for us to discuss here what the State might or might not have done, in the way of exercising easement itself or authorizing anybody else. What the State undertook to do was to give, again, the fee to another person. That it could not do, in my opinion. I am referred to cases holding that a grant cannot be held void in a collateral action. But it is not necessary to declare it void. It is sufficient to declare that this deed here introduced in evidence does not convey to Mr. Wellbrock the right to maintain upon the land, the fee of which has already been granted to somebody else, the particular structure which he put up. These conclusions lead to the direction of a verdict in favor of the plaintiff."

Nor is there anything in the decision of the New Jersey Court of Errors and Appeals in the case of

Stevens v. Paterson & Newark R. R. Co., 34 N. J. Law, 532, or of this Court in *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656, that in any way militates against this view. The exact and only question involved in the Stevens case was whether, under the New Jersey law, an owner of the upland bordering upon a navigable stream had such an interest in the land below high-water mark as that the state could not, without his consent or making him compensation, grant to a railroad company the right to construct, across and in front of his land and below high-water mark, a structure for supporting a railroad. The land owner claimed a potential right of adjacency but the Court held that no such right existed prior to its being reclaimed, saying:

“In all these controversies extending from ancient through modern times, I do not find that it has ever been suggested that as an incident to his estate the owner of the terra firma along the line of tide water is possessed of any peculiar privileges with the exception of those of alluvion and reliction—*privileges which are, perhaps countervailed by the loss to which he is subject from the washing away of his land.* * * * The owner of land along the shore is entitled to no right as an incident to such ownership *except the contingent one of alluvion and reliction* * * * and that such title was attended with the usual concomitants of all ownership of realty.”

These quotations make it plain that the Court in the Stevens case not only expressly recognized rights arising by accretion or reliction but expressly excepted them from the conclusions it reached about the specific question that was involved.

In the Hoboken case above referred to the precise question was whether a street that was opened to an original high-water mark could be extended to an outer line as against a grant by the State to a railroad company which improved to such outer line over lands filled in under the grant. The affect of accretions was in no way involved in either case and this Court, at page 691 (124 U. S.) says:

“In other words, under that grant the land conveyed was held by the grantees on the same terms on which all other lands are held by private persons under absolute title and *any previous right of the State of New Jersey therein*, whether proprietary or sovereign is transferred and extinguished, except such sovereign rights as the State may lawfully exercise over all other private property.”

Indicating that the question was wholly one of a surrender of the State's rights and that there was no consideration whatever given to the private rights of the land owners arising from accretion.

Too much stress cannot be laid upon the decision of the Court of Errors and Appeals in 1897 in *Polhemus v. Bateman*, 60 N. J. Law, 163, which we believe to be the last word of the Court of last resort of New Jersey, long since the decision in both the Stevens case and the Hoboken case, as to the rights obtained under a riparian grant such as the defendants here rely on. The grants in all the cases were, necessarily, under the statute, limited to the statutes under which they purported to be given. They describe the property and the effort of the defendant to give to its riparian grant some peculiar virtue by reason of the fact that there is a specific description by metes and bounds out to the exterior

line of filling can in no way derogate from the ambulatory character of the starting point which now and then, of course, has greatly shifted.

QUIA TIMET.

The other aspect of the bill, presented by virtue of the new equity rules, is asserted in the sixth and seventh paragraphs of the bill, and is entirely independent of the New Jersey statute referred to, and is an appeal to the original equitable jurisdiction of the Court *quia timet*, seeking to remove from the title of the complainants to the *locus in quo* the cloud thereon arising by virtue of the riparian grant, which is alleged to be void and of no avail against the complainants.

The distinction between these two causes of action is noted in *Nixon v. Walter*, 41 Eq. 103, where in a tract of land bounding on the high-water mark of Delaware Bay and Morris River Cove, having a width of six rods, was conveyed to one person and the land more remote from the bay was conveyed to another person, having for one of its boundaries the inward line of the six rod strip previously conveyed. The waters of the bay and cove gradually submerged the six acre tract, which at the time of the conveyance was high land, whereupon the owner of that tract made claim that he was entitled to a movable freehold, citing the case of *Scrutton v. Brown*, and the owner of the more inland tract filed a bill to quiet title under the statute, but failed to maintain it as such bill because he was unable to prove peaceable possession, which had been denied by the defendant. He was permitted to maintain the bill as a bill *quia timet*, and obtained a decree in his favor, the Court

holding that the six rod strip of upland was a fixed freehold, and as that strip was eaten away by erosion, the owner thereof lost just as in the event of accretions he would have gained by the action of the waters. The right to maintain a bill *quia timet* is further shown by the following cases:

Sheppard v. Nixon, 43 Id. 627;

American Dock & Improvement Co. v. Trustees for the Support of Public Schools,
39 N. J. Eq. 409.

There are, therefore, two distinctions between the suit at bar and the New Jersey case, the decree in which is claimed to be *res judicata* of this issue.

First: Assuming, which we deny, that the New Jersey case decided anything and is *res adjudicata* of anything, it simply held that we have no title by virtue of the Leeds' and McClees' deeds. Here we are claiming both possession and title by virtue of accretion, an entirely distinct thing as appears from the opinion of Mr. Justice Swayze.

Second: We assert an independent claim under the general equitable jurisdiction of the Court, to have the cloud arising from the riparian grant removed, and our right to this relief is based not upon the statute but upon equitable principles *quia timet*. It is, therefore, obvious that, attributing to the New Jersey case the dignity of an adjudication (which it does not deserve) neither one of the issues here raised was raised there.

Petitioner urges that there are lines in conveyances in plaintiff's chain of title that do not run parallel to the street system, as argument against plaintiff's contention that the lands made by accre-

tion within the side lines of the lot, and extended parallel to the street system to the high-water mark belong to plaintiff. It is sufficient to say that all of the radial lines referred to by petitioner are under the high-water mark of the Atlantic Ocean, and have nothing whatever to do with the lands in question.

The order in the Court of Chancery upon the application to amend the final decree therein, page and the petition and order in the Court of Errors and Appeals, pages and , to amend the remittitur therefrom have been included in this brief, pursuant to the following stipulation:

“UNITED STATES SUPREME COURT.

STEVENS

v.

ARNOLD, *et al.*

No. 598.

IT IS STIPULATED AND AGREED between counsel in the above stated cause that the order in the Court of Chancery of the State of New Jersey, bearing date the thirteenth day of December, 1915, page , and the petition filed in the Court of Errors and Appeals, dated the fifteenth day of June, 1920, page , and the order made thereon, bearing date the twenty-sixth day of June, 1920, page , may be printed in respondents' brief and used in the argument of the above stated cause.

HARVEY F. CARR,

Of Counsel with Petitioner.

GEORGE A. BOURGEOIS,

HARRY R. COULOMB,

Of Counsel with Respondents.”

It is respectfully submitted that the decree of the United States District Court, affirmed in the Circuit

Court of Appeals for the Third Circuit, should be affirmed.

GEORGE A. BOURGEOIS,
HARRY R. COULOMB,
*Attorneys and of Counsel with
Respondents.*
ROBERT H. McCARTER,
Of Counsel with Respondents.

**STEVENS v. ARNOLD ET AL., EXECUTORS AND
TRUSTEES OF NIRDLINGER.**

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

No. 200. Argued May 2, 1923.—Decided May 21, 1923.

1. A suit under 4 N. J. Comp. Stat. p. 5399, to determine title to land, must be dismissed, according to the interpretation of the highest New Jersey court, if the plaintiff fail to show title in himself, even though the defendant set up an independent title, and although the statute provides for a decree conclusively settling the rights of all the parties. P. 268.
2. Dismissal of the bill, in such case, estops the plaintiff from asserting against the same defendant, in a second suit, any ground of title existing at the time of the first suit, especially one that was then waived. P. 268.
3. Such dismissal does not establish the title set up by the defendant; but he may reassert it, by counterclaim, in a second suit

brought by the plaintiff, and, in so doing, does not waive the benefit of the former decree as an adjudication against the plaintiff's title. P. 269.

4. In New Jersey, a grant by the State of land flowed by the tide revokes the license to riparian owners to wharf out or otherwise encroach upon the tract granted, but it does not prevent them from gaining title by accretion, even though the grant be described by metes and bounds. P. 269.
5. Lands formed by accretions of the sea upon a convex shore, held bounded, not by lines spreading fan-wise from riparian boundaries but by a city street extending through the accreted tract as shown on a plan adopted before the accretions took place. P. 270. 273 Fed. 1022, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court against the present petitioner, in a suit brought by respondents' decedent to quiet title to a parcel of land.

Mr. Harvey F. Carr for petitioner.

Mr. Robert H. McCarter, with whom *Mr. George A. Bourgeois* and *Mr. Harry R. Coulomb* were on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill to quiet title to land in Atlantic City, New Jersey, brought primarily at least under a statute of that State. 4 Compiled Stat. p. 5399. (P. L. 1870, p. 20.) The suit was begun by Samuel F. Nirdlinger and now is maintained by his executors and trustees (the respondents). He owned a parcel lying to the East of New Hampshire Avenue, which runs north and south, and to the north of Oriental Avenue which crosses the other avenue at right angles. The defendant owns an adjoining parcel on the other side of New Hampshire Avenue and the land in controversy is a triangular tract having its apex in the southwestern corner of the complainants' lot

and spreading South of Oriental Avenue and East of New Hampshire Avenue to the sea. It has been formed by accretion in recent years. The defendant claims title by a former adjudication and by a riparian grant from the State. The District Court entered a decree for Nirdlinger after an elaborate discussion, 262 Fed. 591, and its opinion was adopted and the decree affirmed by the Circuit Court of Appeals. 273 Fed. 1022.

The former adjudication relied upon by the defendant was in a suit in the State Court brought against him under the same statute for the same purpose as the present one, by Nirdlinger and the Dewey Land Company from which Nirdlinger afterwards purchased a part of his land. The statute allows a person in peaceable possession of lands, claiming to own the same, whose title is disputed, to bring a suit in chancery against any person claiming an interest, calling upon him to set forth his title. After the issues are tried the decree is to settle the rights of all parties and to be conclusive. The complainants in the chancery suit alleged possession and claimed ownership, at first by accretion but by amendment by virtue of two deeds only. The defendant, as here, set up his riparian grant and a claim by accretion. The Chancellor held that the grant from the State could not be impeached collaterally and dismissed the bill. The Court of Errors and Appeals held this to be error but affirmed the decree on the ground that the complainants showed no title; that the deeds did not give the right claimed and that "all claim by accretion is waived." *Dewey Land Co. v. Stevens*, 83 N. J. Eq. 314, 316; *ibid.* 656. It would have been intelligible if the Court had held that the complainants' statement of title was immaterial and that it was enough that they showed possession and a claim of ownership. But it being established that, notwithstanding the claim, if the title disclosed is defective the bill must be dismissed, we think that until the

Court of Errors and Appeals decides otherwise it must be assumed that the decree is conclusive between the parties that at that time the complainants did not own the land. We cannot imagine that the statute contemplated a series of suits based on coexisting titles produced one after another, and especially when the one now relied upon was waived in the earlier case. We assume that the usual rule applies, and that if the claim to own must be justified, all justifications then existing are in issue. It follows that the plaintiffs' bill must be dismissed.

But plainly the claim of the defendant was not established in the former suit. That appears from the nature of the decree, from the opinion of the Court of Errors and Appeals, and from the admitted fact that it subsequently refused to amend its remittitur so as to establish the defendant's right. See also *Dewey Land Co. v. Stevens*, 85 N. J. Eq. 374. Therefore the defendant took a proper step and did not waive the benefit of the former decree when in the present case he made a counterclaim and asked that his rights be adjudicated to be paramount. Upon this matter the discussion of the District Court was adequate and convincing, so that the unsatisfactory result will be that neither party can get a declaration of title and the complainants will be left to stand upon their possession alone.

The first ground of the defendant's claim is a grant from the State to the defendant's predecessors in title of land flowed by tidewater at the date of the deed, June 28, 1900, which included the strip in controversy. There seems to be no doubt from the decision of the Court of Errors and Appeals that this grant put an end to the right of the complainants to build wharves or otherwise to encroach upon the granted land, that being regarded as merely a license, revoked by the grant. The defendant contends that the effect was greater still, and relies upon a statement in the decision referred to, that

"if the land was formerly fast land, [as this was said to have been] and the title was lost by erosion, it became the property of the State, not merely as long as it remained under water, but, if the State made a riparian grant, absolutely." This form of statement remained unchanged notwithstanding the criticism in a concurring opinion by White, J., 83 N. J. Eq. 656. But we agree with the District Court that it means no more than we have stated, and is shown to mean no more not only by the authority cited but by the following words in the opinion: "The title lost by erosion was then lost forever, unless it was regained by accretion, and the right of accretion was the compensation of the former owner for his loss." We presume from this language that in New Jersey as elsewhere by the common law the right of accretion is not like the permissive right to use land still under water, but is a right as against the State as well as its grantees, when as here the grantees have not filled in the land. In some countries that inherit the Roman law the rule may be different. *Ker & Co. v. Couden*, 223 U. S. 268. We conclude that the conveyance by the State did not give the defendant a title to land added by accretion to the complainants' premises, and that it does not matter that this conveyance was by metes and bounds. The boundaries however indicated were good until changed by the gradual work of the ocean and then were modified in accordance with what we believe to be the common law. *Banks v. Ogden*, 2 Wall. 57.

The defendant's other contention is that as the former seashore was convex the dividing lines should spread outward like a fan, and not continue the north and south divisions indicated by the extension of New Hampshire Avenue to the present or recent high-water mark. Without going into the details elaborated by the District Court we agree that since a plan was made in 1852

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showing New Hampshire Avenue as extending farther south even than at present the existing street system was adopted and recognized New Hampshire Avenue as the dividing line as well for accretions as for the fixed land. The result is that both the bill and the cross bill must be dismissed.

Decree reversed.

Bill and cross bill dismissed.

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